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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-744

HUGH J. ADDONIZIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BERNARD HELLRING,
Counsel for Petitioner,
1180 Raymond Boulevard,
Newark, New Jersey, 07102.

HELLRING, LINDEMAN & LANDAU,
Attorneys for Petitioner.

MICHAEL EDELSON,
On the Petition.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Hugh J. Addonizio, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on September 16, 1971, Petition for Rehearing denied on November 9, 1971.

Citations to Opinions Below

The opinion of the United States District Court for the District of New Jersey on pretrial motions is reported at 313 F. Supp. 486 (D. N. J. 1970). The opinion of the

United States Court of Appeals for the Third Circuit is printed in Appendix A and is not yet reported. An order of the Court correcting it's opinion is printed in Appendix BX. The order denying the Petition for Rehearing is printed in Appendix C and is not reported.

Jurisdiction

The judgment of the United States Court of Appeals affirming the judgment of conviction of Petitioner for conspiracy and substantive acts of extortion in violation of 18 U.S.C., Section 1951 was entered on September 16, 1971, Petition for Rehearing denied on November 9, 1971.

Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Statutes and Constitutional Provisions Involved

The statute involved is Title 18 U.S.C., Section 1951. The constitutional provisions involved are the Fifth and Sixth Amendements to the Constitution of the United States. They are printed in Appendix D, *infra,*

Also printed in Appendix D is Section 3.4 of the ABA Standards Relating to Fair Trial and Free Press (Approved draft, March 1968).

Questions Presented

1. Whether Petitioner was denied the right to a fair trial by an impartial jury, where nine of the twelve jurors rendering the verdict had been exposed to pre-trial publicity of a most prejudicial and pervasive nature, and yet the trial court refused repeated defense requests to question prospective jurors individually as to the content of the publicity to which they had been exposed.

2. Whether Petitioner was entitled to a charge which fully explained to the jury the distinction between the crimes of bribery and extortion where the evidence clearly presented a factual question as to which crime was involved.

3. Whether the application of the co-conspirator hearsay exception and the admission of the grand jury testimony of co-defendant Philip Gordon violated Petitioner's rights of confrontation and due process in the circumstances of this case where no testimony was given either by Gordon or the co-defendants who allegedly made hearsay statements implicating the Petitioner.

4. Whether denial of Petitioner's motions for severance deprived him of a right to a fair trial where, because of the joint trial, Petitioner was not permitted to comment in his summation concerning the fact that his co-defendants did not take the stand; where most of the evidence against him, on an extortion indictment, was in the form of hearsay statements attributed to those same defendants; and where the grand jury testimony of one co-defendant that he took money was admitted into evidence.

Statement of the Case

Petitioner and 14 others were indicted on December 17, 1969 in a 66-count indictment including one count of conspiracy to extort and 65 counts of extortion in violation of the Hobbs Act, Title 18 U.S.C. §1951. Named as co-conspirators were Petitioner, then Mayor of the City of Newark, seven past or then present members of the Newark City Council, three municipal employees, one contractor, and three men widely reputed to be members of organized crime. Trial commenced on June 2, 1970 while petitioner was in the midst of a campaign for reelection.

The pretrial publicity concerning the Petitioner in the case was tumultuous and highly prejudicial. It had continued virtually unabated for a period of over two years right up to the date of trial; including wide coverage in both local and national mass media of 1) the many appearances of Petitioner before both federal and local grand juries where he invoked his privilege against self-incrimination and had that privilege tested in open court, 2) consideration by high state and federal officials of taking action to remove Petitioner from office because of his use of the Fifth Amendment, 3) the release of the "DeCalvacante" and "DeCarlo" tapes (the latter after the return of this indictment) by the Government in unrelated matters in which purported members of organized crime were reported boasting of their control over the City of Newark, 4) an alleged confession by co-defendant Philip Gordon that he took money, 5) the death of co-defendant Mario Gallo in a car crash; 6) reports that the case had been "cracked" by "inside informers", and 7) the reputation for ruthlessness and power of defendant "Tony Boy" Boiardo as a mafia chieftan.

All motions by Petitioner for continuance and severance from Philip Gordon and the reputed Mafia members were denied.

The jury was selected in two and one-half days. Out of a total of 103 jurors called and questioned, only six indicated that they had heard nothing about the case prior to appearing in court in response to their jury subpoenas. The repeated requests of Petitioner and other defendants, both written (499a)[1] and oral, (772a, 774a, 780a, 711a, 718a) to question those jurors indicating ex-

[1] "a" citations are to joint appendix filed by appellants Addonizio, LaMorte, Vicaro and Biancone in the Third Circuit.

posure to pretrial publicity as to the content of that publicity were denied.

The Government's case told the story of a fictitious bank account set up through the collaboration of the witness Irving Kantor and the defendant Joseph Biancone. Close to $1,000,000.00 in cash was generated through the use of this account; that cash being turned over to the defendant Biancone. The persons using the account were those who made up the joint venture which was under contract with the City of Newark for the construction of the South Side Interceptor Sewer System (hereinafter "SSISS"). Irving Kantor did not know what the cash was to be used for except that Biancone told him contractors had to pay cash to his boss; later identified as Boiardo. Kantor was also permitted to testify to overhearing a conversation between Biancone and one Herman Braun who had submitted a bid on a Newark Housing Authority contract in which Biancone solicited three percent of the Braun bid telling Braun, "we need the money for the Mayor's campaign" (1454a).

Other important witnesses called by the Government were Joseph Foley and Peter Homack, employees of an engineering firm which originally designed the SSISS; Harry J. Gillespie and Charles Mack Albertson, employees of Interpace Corp. which got the pipe supply contract on another job with the City of Newark, the Southerly Extension; and Ralph Cestone, head of Verona Construction Company which qualified but did not bid on the SSISS job and which obtained the contract on the Southerly Extension job.

None of these witnesses testified to any conduct of the Petitioner which indicated his participation in or knowledge of these demands. Albertson in fact testified that he

knew he could have gotten a certain contract by going directly to City Hall but he still would have had a problem in performing the work because of the control of Biancone and the engineers and that it was easier and cheaper in the long run to cooperate with them (2474a). Cestone testified to many conversations with a John Sepede, an engineer who was to perform the SSISS contract (replaced upon his death by Rigo); and to conversations with Mario Gallo and Joseph Biancone concerning the formation of the group of contractors to perform the work, to obviate competitive bidding and to raise a certain amount of money for pay-offs (2097a, 2098a). The discussions of these men included negotiations among them as to who would get the contract; who would submit competitive bids and how much the successful bidder would pay for the complimentary bids of the others (2130a), but no participation by Petitioner.

Testimony, however, did come from each of these witnesses which was highly prejudicial to the Petitioner and which was designed to create the general impression that Petitioner was implicated in the illegal activities about which they had testified. This evidence was all in the nature of hearsay. Most of it was admitted under the co-conspirator hearsay exception. Thus the jury heard repeatedly from these witnesses that Biancone said he was in the business of collecting political contributions for the Newark administration, that Biancone said he needed money for the Mayor's election, that Biancone said the money went to the political war chest, that Sepede said that a certain pipe would be used because Gallo, who manufactured the pipe, was a heavy contributor to the Mayor's campaign, that LaMorte said "the contract is yours, but we will require the usual."

The last witness called by the Government was Paul Rigo, who supplied the only direct testimony against Petitioner. Rigo's testimony, given in exchange for a grant of immunity, was totally discredited by cross-examination and by defense witnesses. His testimony also included much hearsay. He testified that Boiardo told him that he, Boiardo, took care of the Council and Mayor (2611a), and that LaMorte made demands upon him for the payment of $25,000.00 to himself and $10,000.00 for the Mayor and each of the Councilmen (2903a).

The Government also introduced, over the objection of Petitioner but with no objection from Gordon, the grand jury testimony of Gordon in which he admitted accepting money from Rigo on two separate occasions; each time in the amount of $2,000.00 for himself and $2,000.00 for co-defendant Guiliano "in connection with the Water Authority jobs." (3048a-3054a)

On the day the Government rested, the defendants remaining on trial were Petitioner, Boiardo, Biancone, Vicaro, LaMorte and Gordon. Two defendants had died prior to the commencement of the trial. All others had been severed. On that same day Boiardo was severed as a result of having suffered a heart attack.

Defendant Addonizio testified on his own behalf at the trial. None of his co-defendants took the witness stand. At the close of the case, Petitioner's motion for severance, renewed on grounds previously asserted and now based on the fact that his co-defendants had not testified and that he felt compelled to mention this in his summation, was denied. He was also instructed to make no direct or indirect reference to the fact that his co-defendants did not take the witness stand.

Petitioner and all co-defendants were found guilty by the jury of conspiracy and 63 substantive counts; counts 65 and 66 were dismissed by the Court. Petitioner was sentenced to ten years in prison and fined $25,000.00.

REASONS FOR GRANTING THE WRIT[2]

POINT I

The decision of the United States Court of Appeals for the Third Circuit in this case recommended that in future cases there should be compliance with Section 3.4 of the ABA Standards Relating to Fair Trial and Free Press. In spite of that, the court found no error here in the trial court's denial of defendants' repeated requests to follow the Standards and question prospective jurors individually to ascertain the nature of their exposure to potentially prejudicial pretrial publicity and the content of that publicity. This is in conflict with the Ninth Circuit opinion in *Silverthorne* v. *United States,* 400 F. 2d 617 (1968) holding denial of the same request in similar circumstances to have deprived defendant of his constitutional right to a fair trial by an impartial jury.

The publicity which preceded the trial of this case was greater even than that which normally could be expected where the Mayor of the largest city in the State is charged with serious crimes. Even the trial court characterized that publicity as "clearly both extensive and intensive." *United States* v. *Addonizio,* 313 F. Supp. 486, 493. It was also highly prejudicial.

Unfavorable publicity was widely carried in all forms of the mass media. It began for Petitioner, Hugh J.

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[2] Petitioner also adopts the reasons set forth in all other petitions arising out of the consolidated appeals below.

Addonizio, in February, 1968. At that time a Select Commission on Civil Disorder appointed to study the 1967 riots in the City of Newark issued a widely publicized report in which it referred to a "pervasive feeling of corruption" in the Newark City Administration. A county grand jury was convened to investigate this charge and Petitioner, in response to subpoena, appeared before that body on five separate dates. After his first appearance he realized he was a "target" of the investigation and invoked his constitutional privilege against self-incrimination. His last appearance before that grand jury was on June 3, 1969. On that date, as on three prior occasions, Petitioner's reliance on his constitutional privilege was tested in open court, resulting in tumultuous publicity.

In early December 1969 Petitioner was subpoenaed to appear before a Federal Grand Jury. Again he claimed his constitutional privilege and again had the privilege tested in open court. The court found the reasons given by Addonizio for the invocation of his privilege to be insufficient and indicated Addonizio would have to give more specific reasons. Accordingly, Petitioner took the stand and testified as follows concerning his refusal to respond to the question, "Do you know a man personally by the name of Anthony Boiardo, also known as 'Tony Boy' Boiardo?":

> "Well, Your Honor, may I just say very briefly that my lawyer has already indicated several reasons why I feel this answer may tend to incriminate me, but it is also my belief and my opinion that this man is reported to be under investigation by various law enforcement agencies. I do know him, and the answer may provide a link in the chain of evidence which may tend to incriminate me." (228a, 229a)

Among the resulting front-page headlines were the following: "ADDONIZIO TONGUE SLIPS, ADMITS KNOWING MOBSTER" (6768a); "ADDONIZIO TOLD TO TALK IN PROBE" (6626a); "ADDONIZIO TESTIFIES HE KNOWS 'TONY BOY'" (6642a).

At the same time reports began appearing in the newspapers concerning the joint request of the United States Attorney and the prosecutor of Essex County for a turnover to the Federal Grand Jury of the material developed by the County Grand Jury. There was also wide discussion of impending indictments resulting from "inside informers."

On December 17, 1969, the indictment in this case was returned naming Petitioner along with fourteen others in the 66-count indictment charging conspiracy and substantive acts of extortion. Included in the list of co-conspirators were Anthony "Tony Boy" Boiardo and two other men widely reputed to be members of organized crime. Immediately before the indictment mass media reported discussions between Federal and State officials concerning possible ouster of Addonizio as a result of the invocation by him of his constitutional privilege before the Grand Jury.

On January 6, 1970, while publicity surrounding the return of the indictment was still at its height, the notorious "DeCarlo Tapes" were released by the Government in connection with another Federal prosecution then in progress. Reputed Mafia figures were reported as saying they had financially backed the political campaigns of Petitioner and were reported to have attempted to buy off other potential candidates. *The New York Times* carried a special section on the Tapes headed "ADDONIZIO CITATIONS" (6718a). The blaring front-page headlines

included "U. S. WENT TAP TAP TO GET THE GOODS IN NEWARK QUIZ" (6672a); "NEW JERSEY: HAND OF THE MAFIA IS FELT FROM COP TO TOP" (6668a); "A DISCUSSION ON THE MOB'S HELP TO ADDONIZIO" (6721a); "DECARLO TAPES DO A LOT OF BIG NAME DROPPING" (6728a); "THE MAFIA TAPES: WE RAN NEW JERSEY" (6730a); "NEWARK TAKE-OVER BOASTED" (6753a).

Philip Gordon, named as a co-conspirator in the indictment and then Corporation Counsel of Newark, had resigned from office creating a further barrage of publicity concerning an alleged confession by Gordon that he had taken money. The violent death of Mario Gallo on February 9, 1970, a contractor and defendant served to further add to the flames of publicity.

The argument of pretrial motions in March of 1970 kept the case on the front page of the State's newspapers. Coverage of Petitioner's election and run-off election campaigns, with reports of his political opponents' allegations of corruption continued until the commencement of the trial. The tumultuous, sensational and highly prejudicial nature of the continuing publicity, containing reports, allegations and speculation of a nature clearly not admissible in a court of law, cannot be questioned.

Against this background, jury selection commenced in Trenton on June 2, 1970. All pretrial motions for dismissal of the indictment and for continuance based on the pretrial publicity were denied by the trial court on the theory that its voir dire would assure a fair and impartial jury. (*United States* v. *Addonizio*, 313 F. Supp. 486, 494; repeated requests for continuance were denied thereafter.)

Jury selection took only two and one-half days. One hundred three prospective jurors were questioned. Of that total, only six indicated that they had had no ex-

posure to pretrial publicity concerning either the defendants or the case. Of the twelve jurors rendering the verdict, nine had indicated exposure to pretrial publicity. Petitioner made repeated requests both orally and by submission of written requests for voir dire questions that any prospective juror indicating exposure to pretrial publicity be questioned individually and out of the presence of other prospective jurors concerning the content of that publicity. All such requests were denied. The Judge questioned the jurors only as to whether or not they had read, seen or heard anything concerning the case and if so, from what sources and with what frequency.

Petitioner's request that prospective jurors be asked the content of the publicity to which they were exposed was in accordance with Section 3.4 of the ABA Standards Relating to Fair Trial and Free Press which provides:

> "(a) *Method of examination*:
>
> "Whenever there is believed to be a significant possibility that individual talesmen will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to his exposure shall take place outside the presence of other chosen and prospective jurors. An accurate record of this examination shall be kept, by court reporter or tape recording whenever possible. The questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how his exposure has affected his attitude toward the trial, not to convince him that he would be derelict in his duty if he could not cast aside any preconceptions he might have."

Section 3.4(b) provides *inter alia*:

> ". . . A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or the contents of a confession, or other incriminating matters that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to his testimony as to his state of mind." (Approved draft, March 1968, pages 9 and 10).

At the time jury selection was taking place in this case, three Circuits, the Ninth Circuit in *Silverthorne* v. *United States*, 400 F. 2d 627 (9th Cir. 1968), the First Circuit in *Patriarca* v. *United States*, 402 F. 2d 314 (1st Cir. 1968) and the Fourth Circuit in *United States* v. *Sawyers*, 423 F. 2d 1335 (4th Cir. 1970) had expressed agreement with the procedures outlined in Section 3.4. The Court in *Silverthorne* had held the trial court's denial of a defense motion to examine the jurors individually as to the content of the publicity to which they were exposed was an abuse of discretion prejudicial to the defendant. *Supra*, 640. In that case, as in the instant case, the trial judge had adopted the "Arizona Plan" of voir dire examination. He asked the prospective jurors if they had read or heard anything concerning the case, but

> "made no effort to ascertain *what* information the jurors had accumulated and, consequently, had no way of objectively assessing the impact caused by this pretrial knowledge on the jurors' impartiality." Ibid, p. 638.

If there is a distinction between the instant case and *Silverthorne*, it is that the publicity here was more preju-

dicial in nature and more pervasive in scope than in *Silverthorne.*

On July 1, 1970 the Fifth Circuit in *United States* v. *McKinley*, 429 F. 2d 1019 (5th Cir. 1970) *cert. denied* 401 U. S. 922 joined the Ninth, First and Fourth Circuits in recommending in the proper case that the procedure set forth in the Section 3.4 ABA, Standards Relating to Fair Trial and Free Press be followed.

The Third Circuit in its opinion in this case makes the same recommendation while at the same time finding the failure to follow said procedure in this case not to have been reversible error. We submit that this finding is in direct conflict with that of the Ninth Circuit in *Silverthorne.*

POINT II

In holding that the trial court's charge to the jury adequately distinguished between the crimes of bribery and extortion, the United States Court of Appeals for the Third Circuit defined extortion under the Hobbs Act, Title 18 U.S.C. §1951, and distinguished it from the crime of bribery, thereby deciding an important question of federal law which has not been, but should be, decided by this court, particularly where the definition adopted by the Third Circuit fails to take full account of the New York cases defining the crime under the New York Statute on which the Hobbs Act was based and where a clear jury question was presented as to which crime, bribery or extortion, was involved.

The indictment charged defendants with conspiracy to extort and 65 substantive acts of extortion in violation of the Hobbs Act, Title 18 U.S.C. §1951.

The Third Circuit in its opinion states:

> "The Hobbs Act definitions of robbery and extortion are from New York law, *United States* v. *Nedley*, 225 F.2d 350, (3d Cir. 1958). The definition of extortion at the time of the Hobbs Act's enactment was found in former New York Penal Law, §850. In interpreting §850, the New York courts distinguished extortion from bribery". (39A)[3]

Appellants argued in the Third Circuit that the only inference from the evidence at the trial was that if any crime was proved it was bribery and not extortion. The statement of the case sets forth some of the evidence upon which this contention was based.

While the Third Circuit did not accept appellant's argument, it did state:

> "First, while the contractors' advance knowledge that a kickback would be required might give rise to a jury question as to whether the transactions were briberous or extortionate, we cannot agree that advance knowledge alone conclusively establishes bribery". (40A)

Since a jury question was presented, defendants were entitled to a jury charge which fully and clearly distinguished between the two crimes and which fully and clearly advised the jury that proof of the crime of bribery did not support a conviction under the indictment in this case.

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[3] "A" citations are to the appendix which is a part of this petition.

The distinction between the crimes of bribery and extortion is clear cut under the New York law upon which the Hobbs Act is based and under the New York cases interpreting that law. There is no question that under such interpretation the two crimes were considered mutually exclusive. *People* v. *Feld*, 262 App. Div. 909 (2nd Department, 1941). The Third Circuit in discussing the definition given the crimes by the New York courts comes up with the following "shorthand" distinction:

> "In other words, while the essence of bribery is voluntariness, the essence of extortion is duress. *People* v. *Dioguardi*, 8 N. Y. 2nd 260, 168 N.E. 2d 683 (1960)." (39A)

The entire charge given by the trial court on the issue was:

> "The proof must show Ladies and Gentlemen, that the defendants induced their victim or victims to part with money through the use of fear, and unless the payments here alleged were made under some form of compulsion, there is no crime under the Hobbs Act. Mere voluntary payment of money, unaccompanied by any . . . [fear?] of economic loss, would not constitute extortion as I have described it to you." (5749a-50a)

The court had refused defendants' requests to use the word bribery and to define that crime in its charge. The charge given by the trial court, although fitting the Third Circuit's analysis of the distinction between bribery and extortion, was meaningless without further definition of the terms "voluntary," "compulsion," and "fear of economic loss." Defendants had requested the following charges on the issue:

"To find fear of financial injury you must find the alleged victims of the extortion were compelled to pay for the exercise or enjoyment of a right or privilege already belonging to them, under threat and out of fear that if they did not comply with the demands they would be subjected to unwarranted interference, with resulting harm to its business or property rights." (Petitioner's request for charge No. 26, page 528a)

"The indictment is concerned with the crime of extortion. It does not charge bribery. Bribery and extortion are two separate and distinct crimes. They are mutually exclusive. That is to say, the illegal receipt of money by or on behalf of a public official may be either bribery or extortion. It cannot be both.

"Extortion, insofar as this case is concerned, is the obtaining of property from another, with his consent, induced by the wrongful use of fear of financial injury, or under color of official right. Bribery, on the other hand, is the payment of money to a public official or someone on his behalf in order to influence his official action. A public official who, either directly or indirectly, requests a bribe and is paid a bribe, is guilty of bribery and not of extortion.

"If you believe beyond a reasonable doubt that a particular person doing business with the City of Newark paid money, either directly or indirectly, to certain city officials or others acting on their behalf, you may not convict any defendant unless you also find beyond a reasonable doubt that the payment was made pursuant to extortion rather

than bribery. In other words, if you are convinced that the payments were made, but have a reasonable doubt as to whether extortion was involved rather than bribery, you must acquit all defendants.

"As pertains to the indictment, the essence of the crime of extortion is the use of fear of financial injury upon a person who is attempting to exercise a right already his. More specifically, if a contractor or engineer has been awarded a contract or otherwise has a legal right to perform certain work, and thereafter someone requires him to pay money as the price of his being able to exercise that right, then the contractor has been the victim of extortion. If, on the other hand, the contractor, before obtaining the legal right to perform that work, agrees in advance to pay money in order to obtain that work, then the contractor has agreed to pay a bribe, and the crime of extortion is not involved.

"If money is paid as a bribe, as I have defined that term to you, then it makes no difference that the person paying would prefer not to pay or that the payment is agreed to reluctantly, or that the person paying does so out of fear that if he does not do so, he will not obtain the work involved, and will therefore suffer financial injury.

"Whether a payment involves bribery or extortion depends upon the circumstances which existed at the time the arrangement to pay was made. Bribery does not become extortion merely because pressure is brought to bear upon the bribe payer in order to assure that he will live up to his part of the corrupt agreement." (2nd through 7th re-

quests for charge of defendants Biancone and Vicaro, 539a, 540a)

These requests, in which petitioner joined, embody the proper definitions and distinctions between the crimes of extortion and bribery under *United States* v. *Kubacki*, 237 F. Supp. 638 (E. D. Pa. 1964) and the New York cases of *People* v. *Feld, supra; People* v. *Dioguardi*, 8 N. Y. 2d 260, 168 N. E. 2d 683 (1960); and *Hornstein* v. *Paramount Pictures*, 22 Misc. 2d 699 (Sup. Ct. 1942), aff'd 226 App. Div. 659 (1st Dep't), aff'd 292 N. Y. 468 (1943).

The Third Circuit citation to *Bianchi* v. *United States*, 219 F. 2d 182 (8th Cir. 1955) *cert. denied* 349 U. S. 915 for the proposition that, "[t]here was no need to instruct in detail as to an offense for which defendants were not on trial," (49a) is inapposite, since in that case, unlike the instant case, the finding was that the record would not support a conviction of the crime on which defendants requested a charge.

POINT III

This case was a mass conspiracy trial in which almost all of the evidence incriminating the Petitioner, a prominent political figure, came in the form of "smear" hearsay statements allegedly made by co-defendants who did not take the witness stand. The case thus presents the issues of (a) the validity of the co-conspirator hearsay exception under the confrontation clause of the Sixth Amendment and (b) the constitutional right of a defendant to a severance in such circumstances under both the confrontation clause and the due process clause of the Fifth Amendment. These issues, it is respectfully submitted, should be clarified by this Court.

A. As to the hearsay admitted under the co-conspirator hearsay exception:

The principal testimony in this case against the Petitioner consisted of statements allegedly made by his co-defendants, Biancone, LaMorte, Boiardo and Gordon.

As indicated in the statement of this case, except for the testimony of Rigo, the name of Petitioner, then Mayor of the City of Newark, was tied to the conspiracy only through these hearsay statements allegedly made by his co-defendants. Thus, Kantor testified concerning the conversation between Biancone and Braun. Foley testified to a discussion with a "Mr. B." at a restaurant in which "Mr. B." stated his job was collecting political contributions for the City of Newark Administration (1650a). Homack testified that Biancone told him that he (Biancone) wanted money for the political campaign war chest (1811a). Ralph Cestone testified to numerous conversations with John Sepede, Mario Gallo and Biancone, the purport of which generally were that a certain type of pipe would be used on the SSISS job because Gallo manufactured the pipe and because Gallo allegedly was a heavy contributor to the Mayor's campaign. Albertson and Gillespie both testified to payoff demands made by Biancone in connection with the Southerly Extension job. Rigo testified to a meeting with Boiardo where Boiardo allegedly told him "You pay me the 10 percent . . . I take care of the Mayor. I take care of the Council." (2611a). He then testified to a later demand made by LaMorte upon him allegedly for the payment of $10,000 for the Mayor, $10,000 for each Councilman and $25,000 to LaMorte (2903a, 2904a).

The overwhelming mass of this hearsay testimony was admitted under the co-conspirator hearsay exception. None of the men to whom these statements were attributed took

the witness stand. None of them was available for Petitioner to cross-examine.

Petitioner could not at this joint conspiracy trial ask Biancone, ask Boiardo, ask LaMorte, did you use my name this way? Did you demand this money? Did I know what you were doing? Did any of this money come to me? Were these activities hidden from me by you? As we show in Point IV, *infra,* Addonizio was not even permitted to make the argument to the jury that he could not ask these questions of his co-defendants.

Where the operation of the co-conspirator hearsay exception has such an effect, we respectfully submit it is in clear violation of the Sixth Amendment right of a criminal defendant to confront the witnesses against him. Several recent cases of this Court have dealt with the Sixth Amendment right to confrontation and its relation to traditionally-accepted hearsay exceptions. We submit they have left the question presented by this case unanswered: whether the confrontation clause is violated where in a mass conspiracy trial the overwhelming amount of evidence against a defendant is introduced through hearsay statements allegedly made by co-defendants who choose not to take the witness stand.

That the right of confrontation and cross-examination is an essential and fundamental requirement of the kind of fair trial which is this country's constitutional goal was reaffirmed in *Pointer* v. *Texas,* 380 U. S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965).

The Court wrote:

> "As has been pointed out, a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity

to cross-examine the witnesses against him." Id. 380 U. S. at 406, 407.

In *Bruton v. United States*, 391 U. S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968), the Court found a violation of confrontation rights in the admission of a co-defendant's confession, implicating Bruton, where the co-defendant did not take the stand. The Court in that case raised the question which it then declined to answer, "There is not before us . . . any recognized exception to the hearsay rule insofar as Petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." Id, footnote 3, 391 U. S. at 128

Whether certain traditional exceptions to the hearsay rule violate the confrontation clause was again raised and left unanswered in *California* v. *Green*, 399 U. S. 149, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970). There the Court wrote:

> "While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically in common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. See *Barber* v. *Page*, 390 U. S. 719, 20 L. Ed. 2d 255, 88 S. Ct. 1318 (1968); *Pointer* v. *Texas*, 380 U. S. 400, 13 L.

Ed. 2d 923, 85 S. Ct. 1065 (1965)." Id. 399 U. S. at 155, 156

* * *

"The concern of most of our cases has focused on . . . situations where statements have been admitted in the absence of the declarant and without any chance to cross-examine him at trial. The situations have arisen through application of a number of traditional 'exceptions' to the hearsay rule, which permit the introduction of evidence despite the absence of the declarant usually on the theory that the evidence possesses other indicia of 'reliability' and is incapable of being admitted, despite good-faith efforts of the State, in any way that will secure confrontation with the declarant. Such exceptions, dispensing altogether with the literal right to 'confrontation' and cross-examination, have been subjected on several occasions to careful scrutiny by this Court." Ibid., pp. 161-162

After then citing the specific facts of *Pointer* v. *Texas, supra,* and *Barber* v. *Page, supra,* the Court went on to state:

"We have no occasion in the present case to map out a theory of the Confrontation Clause that would determine the validity of all such hearsay 'exceptions' permitting the introduction of an absent declarant's statements." Id. 399 U. S. at 162

The most recent case on the issue, *Dutton* v. *Evans,* 400 U. S. 74, 27 L. Ed. 2d 213 (1970) produced four separate opinions. All opinions limited themselves to the precise question then before the Court: the constitutionality of a Georgia statute allowing statements in evidence of an

absentee co-conspirator made after the termination of the conspiracy, as that statute was applied in the Petitioner's case. The prevailing opinion written by Mr. Justice Stewart found no violation of the Sixth Amendment right to confrontation. He distinguished *Bruton* and *Douglas* because those cases involved the very serious prejudice resulting from admission of extra-judicial statements of co-defendants in a joint trial. Further, he stated that the evidence objected to was not "crucial" or "devastating" in nature. Reference was made several times to the fact that testimony of only one witness out of twenty was challenged by the Petitioner. Lastly, the opinion described the challenged statement as having been given in circumstances surrounded by indicia of reliability.

If these are the tests to be applied to cases of this nature, it is respectfully submitted that their application here clearly demonstrates a violation of Petitioner's Sixth Amendment right to confrontation. The circumstances and content of the hearsay statements admitted in this case have every indicia of unreliability and none are reliable. Such statements were self-serving to the purported declarant and typical of the unauthorized and unknown use of the name of a prominent political person. Only one witness at the trial gave direct testimony against Petitioner. Through the mouth of that witness and every other important witness, however, there flowed a steady stream of statements attributed to persons not available for cross-examination which were incriminatory to Petitioner. The danger to individuals rights from the procedural and evidentiary rules applicable in mass conspiracy trials is even more apparent where those trials involve public officials who are so peculiarly vulnerable to the type of charges brought in this indictment.

The admission of this evidence under the co-conspirator hearsay exception in the circumstances of this case deprived Petitioner of his due process right to a fair trial; the standard by which Mr. Justice Harlan in his concurring opinion in *Dutton* would test rules of evidence. We respectfully submit that the multiple opinions in *Dutton* v. *Evans* have left the standards to be applied in testing the validity of hearsay "exceptions" under the confrontation clause unclear and have raised the question as to whether their validity should be tested under that clause at all or whether a case by case analysis under due process standards is required. This case we further submit offers the court a vehicle to decide at least some of these issues.

B. As to the grand jury confession of Gordon.

After hearing from Rigo, the jury also heard the grand jury testimony of Gordon wherein he admitted taking money from Rigo on two occasions. This testimony, of course, was not admitted under the co-conspirator hearsay exception.

While we submit that Gordon's grand jury testimony was in no way a confession of participation in a conspiracy to extort, it was highly prejudicial to Petitioner in the context of a conspiracy trial. The trial court did instruct the jury that the testimony could be considered only against Gordon, but the lack of effectiveness of such instructions in a joint trial has long been recognized. *Krulewitch* v. *United States*, 336 U. S. 440, 453, 93 L. Ed. 790, 799, 69 S. Ct. 716 (Mr. Justice Jackson concurring). Because Gordon did not take the stand, Petitioner could not ask him what the circumstances were which led up to the payments by Rigo, whether Gordon had in any way solicited the payments, of whether Gordon was in any way

acting in concert with the Petitioner. We submit that under the reasoning of *Bruton, supra,* the admission of this grand jury testimony was in violation of the Petitioner's Sixth Amendment rights to confrontation.

POINT IV

The decision of the United States Court of Appeals for the Third Circuit that no severance of the Petitioner was required is in direct conflict with the Fifth Circuit opinion in *DeLuna v. United States,* 308 F. 2d 140 (1962).

The Third Circuit in its opinion wrote:

> "Addonizio cites *DeLuna v. United States,* 308 F. 2d 140 (5th Cir. 1962), which clearly supports his position that a severance was required." (20A)

The Court goes on to decline to follow the majority in that case.

DeLuna dealt with the narrow question of whether the Fifth Amendment right of a defendant not to testify protects him from prejudicial comment on his silence made to the jury by an attorney for a co-defendant. The court holding that it did, wrote:

> "If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately." *DeLuna v. United States,* 308 F. 2d 140, 141 (5th Cir. 1962).

In *DeLuna* two defendants, Gomez and DeLuna, were tried jointly on a two count indictment charging them with facilitating the transportation and concealment of

a narcotic drug and with possessing and acquiring a narcotic drug. DeLuna did not take the stand. Gomez did and in his testimony put all the blame on DeLuna. In summation, Gomez's attorney contrasted his client's willingness to take the stand with DeLuna's unwillingness. He argued that an honest man is not afraid to take the stand. The court wrote:

> "And considering the case from Gomez's point of view, his attorneys should be free to draw all rational inferences from the failure of a co-defendant to testify, just as an attorney is free to comment on the effect on any interested party's failure to produce material evidence in his possession or to call witnesses who have knowledge of pertinent facts. Gomez has rights as well as DeLuna, and they should be no less than if he were prosecuted singly. His right to confrontation allows him every inference from DeLuna's absence from the stand." 308 F. 2d at 143.

It was on this basis that the court found a dilemma between what it considered to be the rights of Gomez and the Fifth Amendment rights of DeLuna. The opinion concluded that in such circumstances separate trials should be ordered.

In the instant case the indictment named 15 individuals as co-defendants in a conspiracy count and 65 substantive counts. From the number and character of the defendants petitioner already was painfully aware that he occupied the "uneasy seat" described by Mr. Justice Jackson as being reserved for co-defendants in mass conspiracy trials. *Krulewitch* v. *U. S.*, 336 U. S. 440, 454, 455 (concurring opinion); with several added discomforts.

The defendants named in the indictment fell generally into two groups—public officials and reputed members of organized crime. In the former group was Philip Gordon. On the date set for pretrial motions Petitioner moved for severance from Boiardo, Biancone, Vicaro, and Gordon arguing that the publicity surrounding these defendants made joint trial with them prejudicial. As to Gordon, particularly, he anticipated the introduction by the Government of a "confession" which would be prejudicial to him. Petitioner argued that joint trial of all defendants would make it impossible for him to present a full and adequate defense and that from the "cast" of defendants there appeared to be the real likelihood of the dilemma outlined in *DeLuna* arising. These motions were denied by the trial court, primarily on the basis that they were too speculative and premature. *United States* v. *Addonizio, supra,* at p. 498.

Prior to the commencement of the trial, Gallo and Guiliano died. Benjamin Krusch was severed. On the very first day of trial four other defendants, all Councilmen were severed. Petitioner renewed his motion for severance. He argued now that he would be deprived of the possibility of exculpatory or at least corroborating testimony from the severed defendants; public officials like himself, who were most likely to take the witness stand at trial. Although he did not know the intentions of his co-defendants remaining on trial, it seemed reasonable to assume that at least Boiardo, Biancone, and Vicaro would not testify. The fact that five co-defendants had already been severed meant that a second trial would be required in any event and that the argument of judicial economy need no longer be weighed in ruling on the renewal of his motions. His motion was again denied.

On the day the Government rested its case, all defendants had been severed except Petitioner, Boiardo, Biancone, Vicaro, Gordon, and LaMorte. Petitioner therefore found himself on trial with the very group from which he had sought severance. Boiardo was severed that day as a result of a heart attack.

As indicated elsewhere evidence implicating Petitioner came mostly in the form of hearsay statements attributed to his co-defendants.

When Petitioner took the witness stand, there had been testimony that contractors and engineers doing business with the City of Newark had been engaged in illegal activities and that such activities had been either aided or fostered by certain of his co-defendants. He knew nothing about it, and said so.

Petitioner took the witness stand and in lengthy and detailed direct and cross-examination denied any knowledge or participation in such activities. No other defendants testified.

Accordingly, at the close of defendants' case, Petitioner again moved for severance. What had been called speculation at pretrial was surely now reality.

Petitioner's counsel stated that to adequately present to the jury a defense summation on Petitioner's behalf, he felt compelled to repeatedly and strenuously contrast the fact that Petitioner had taken the stand with the fact that his co-defendants had not. It was central to Petitioner's defense to argue that whatever illegal activities, if any, may have transpired, his participation was neither requested, needed, nor given. He intended to argue that Petitioner personally had nothing to hide, had taken the witness stand and subjected himself to the most

extensive cross-examination the Government or his co-defendants could conduct; but that his co-defendants for whatever reasons had chosen not to testify, leaving the allegations as to them largely undenied and making it impossible for him through cross-examination of them to demonstrate that the content of the hearsay statements allegedly made by them, insofar as it incriminated him, was untrue.

The trial court denied the motion for severance again. It ordered that Petitioner in his summation could make no reference, direct or indirect, to the failure of his co-defendants to take the witness stand (533a).

Denied the right to cross-examine his co-defendants who by hearsay, in effect, had been made into the real witnesses against him at the trial, Petitioner was now denied the opportunity even to point out his handicap in presenting his defense to the jury.

Under the reasoning of *DeLuna*, as the Third Circuit stated, Petitioner was entitled to a severance. The circumstances of this case demonstrate the soundness of the majority opinion in that case. The denial of Petitioner's motions for a severance deprived him of his right to a fair trial under the due process clause of the Fifth Amendment and his right to confrontation under the Sixth Amendment.

As the trial court stated in its opinion and order on pretrial motions, the majority opinion in *DeLuna* has been challenged and often distinguished in other Circuits. *United States* v. *Addonizio, supra,* at 498. Still other Courts have cited *DeLuna* with approval while finding error in trial court decisions denying motions for severance. *United States* v. *Eckles*, 352 F. 2d 892 (7th Cir. 1965); *Byrd* v. *Wainwright*, 428 F. 2d 1017 (5th Cir. 1970).

CONCLUSION

It is therefore respectfully urged that this petition for writ of certiorari be granted.

Respectfully submitted,

BERNARD HELLRING,
Counsel for Petitioner.

HELLRING, LINDEMAN & LANDAU,
Attorneys for Petitioner.

MICHAEL EDELSON,
On the Petition.

[APPENDICES FOLLOW]

APPENDIX A

Opinion of the United States Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,295
No. 19,391
No. 19,392
No. 19,393

UNITED STATES OF AMERICA

v.

HUGH J. ADDONIZIO, RUGGIERO A. BOIARDO, JR., ANTHONY LA MORTE, MARIO GALLO, JOSEPH BIANCONE, RALPH VICARO, NORMAN N. SCHIFF, PHILLIP GORDON, BENJAMIN KRUSCH, FRANK ADDONIZIO, LEE BERNSTEIN, JAMES CALLAGHAN, CALVIN D. WEST, ANTHONY GIULIANO, IRVINE I. TURNER

RALPH VICARO,
Appellant in No. 19,295

HUGH J. ADDONIZIO,
Appellant in No. 19,391

ANTHONY P. LA MORTE,
Appellant in No. 19,392

JOSEPH BIANCONE,
Appellant in No. 19,393

(D. C. Criminal No. 548-69)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Appendix A

Argued February 18, 19, 1971

Before FREEDMAN,* SEITZ and ROSENN, *Circuit Judges*

OPINION OF THE COURT

(Filed September 16, 1971)

ROSENN, *Circuit Judge*.

Appellants, along with eleven others,[1] were named as defendants in an indictment containing one count charging a conspiracy in violation of 18 U.S.C. §371, to interfere with interstate commerce by means of extortion, and sixty-five counts charging substantive acts of extortion pursuant to the conspiracy, in violation of 18 U.S.C. §1951 (the Hobbs Act).[2] After a trial of seven weeks, the jury re-

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*Judge Freedman participated in the consideration of these cases, but died before any disposition was made.

1. Of the 15 original defendants, two (Gallo and Giuliano) died before the trial, five (Krusch, Frank Addonizio, Bernstein, West and Turner) were severed prior to trial, two (Ruggiero Boiardo, Jr. and Norman Schiff) were severed during trial due to illness, and one (Callahan) pleaded guilty during the course of trial to the crime of filing a false tax return in violation of 26 U.S.C. §7206(1) and was thereafter severed from the trial. Philip Gordon was convicted with appellants on all counts but had not been sentenced at the time of this appeal.

2. The pertinent portions of §1951 read as follows:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use

turned a guilty verdict against all the appellants on the conspiracy count and all but two substantive counts.[3] On September 22, 1970, Addonizio, Biancone and LaMorte were each sentenced to ten years in prison. In addition, Addonizio and Biancone were each fined $25,000.00; LaMorte was fined $10,000.00. Vicaro was sentenced to twelve years in prison and fined $10,000.00.

I.

THE EVIDENCE

The Government's theory was that, from as early as 1962 until the date of the indictment, there existed a conspiracy including as its members at various times, the Mayor of Newark, New Jersey (appellant Addonizio), certain members of the city government (including appellant LaMorte) and a group headed by defendant Boiardo (including appellants Biancone and Vicaro), the object of which was to extort kickbacks from contractors, suppliers and engineers engaged in public work projects with the city of Newark, and that in many specific instances the object of this conspiracy was attained. Most of the evidence at trial related to two major city projects—the Southside Interceptor Sewer System (the "Southside project") and the Southerly Extension of Newark's water supply system (the "Southerly Extension"). The following is a capsulized ver-

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Note 2—*Continued*

of actual or threatened force, violence, or fear, or under color of official right.

"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

3. Counts 65 and 66 were dismissed by the court with the consent of the Government prior to submission of the case to the jury.

sion of the evidence relating to those two projects, viewed in the light most favorable to the Government.

A. *The Southside Project.*

Plans for this sewage project began in 1954, with the initiation of the first of two preliminary surveys by the engineering firm of Elston T. Killam Associates (Killam). In 1964, Mayor Addonizio's administration awarded Killam a contract for both the design and the construction supervision phases of this project. The plan called for the installation of an interceptor sewer system through which sewage would be transported from the city of Newark to a treatment plant operated by the Passaic Valley Sewage Commission.

One element of the extortion scheme involved the potential suppliers of pipe for this project. Since the Sewage Commission charged the city of Newark for the volume of sewage entering the plant as measured by a metering device, the Killam firm placed great emphasis on the necessity of obtaining pipe with minimum leakage, since ground water leaking *into* the pipe would increase the metered flow and add to the cost to the city. Killam's drawn specifications therefore required that the pipe to be used be fabricated with rubber and *steel* joints, the closest fitting joints available. Several companies, including the International Pipe and Ceramic Company ("Interpace", formerly Lock Joint Pipe Company), manufactured pipes with rubber and steel joints. Defendant Gallo owned several companies which made only pipe with rubber and *concrete* joints, which permitted much greater leakage.

Killam vigorously and successfully opposed an effort by LaMorte, then assistant to the Newark Director of Public Works and later Director, to substitute rubber and concrete joints in the specifications and increase the leakage allowance by 25%. LaMorte, however, succeeded in having Killam reluctantly include the rubber and concrete joints as an alternate in the specifications. LaMorte then met with Harry Gillespie, an executive of Interpace, and informed him that the job was his—so long as the required 10% was forth-

coming. Interpace, a manufacturer of both types of joints, eventually refused to go along.

When Paul Rigo, an engineer with the firm which eventually replaced Killam, spoke to Mayor Addonizio concerning the superiority of rubber and steel joints, the Mayor informed him that the pipe would be supplied by Gallo, since he, the Mayor, "had an interest in [him]." Gallo had by this time expressed his willingness to Sepede, a project engineer, to pay a required ten percent kickback in order to obtain the supply contract. Alerted by Gillespie, several councilmen raised the issue of the two types of pipe at a council meeting and questioned the propriety of using rubber and concrete joints. In response, the Mayor twice stated, falsely, that only Interpace, which had withdrawn from the bidding, manufactured pipe with rubber and steel joints. In fact, a number of firms, including the New Jersey plant of the Martin Marietta Company, manufactured such pipe. The contract to supply the pipe was ultimately awarded to Gallo.

In the meantime, Killam had been forced out of the project because it refused to pay any kickback. LaMorte, accompanied by an otherwise-unidentified "Mr. B," informed Killam's vice-president, Joseph Foley, at a luncheon that Killam had somehow "slipped through" the city's system of "kickbacks or shakedowns" and would thereafter be required to kick back 5% of its fee. Foley refused. Later Chairman of the Board, Elston Killam, and President Peter Homack, were summoned to City Hall. When they arrived, they went to the office of the Director of Public Works, where they were intercepted by LaMorte. He introduced them to the appellant, Biancone (who never had any official connection with the city government). Biancone took Killam and Homack into the Mayor's office and introduced them to Mayor Addonizio as the engineers who were designing the Southside project. Immediately after the introduction, however, Biancone and LaMorte took the engineers into the corridor outside of the Mayor's office where Biancone informed Killam and Homack that the administration wanted

5% of the firm's engineering fee. Killam refused. Biancone then demanded 4%, then 3%. Killam refused each demand and said he would pay nothing. He indicated he would not be involved in any kickback; would rather give up the contract on Southside, as well as other work he had secured from the City several years earlier and prior to Addonizio's election as Mayor. A few days later, Killam, despite ten years of work on the project, withdrew from it.

The Killam contract was thereupon assigned to a partnership involving Dr. Charles Capen, an elderly engineer, and John Sepede who, unknown to Capen, had already agreed with the defendant Boiardo to pay the required 10%. Sepede soon became ill with cancer, however, and Capen called Paul Rigo, a young engineer, and asked him to help on the project. Rigo accepted. The day he began work Sepede died.

It was not until several weeks later, in March, 1965, that Rigo learned of the Boiardo-Sepede "deal" when LaMorte summoned Rigo to accompany him to meet the "real boss" of Newark. Rigo drove to the offices of Valentine Electric in Newark, where LaMorte introduced him to the defendant Ruggiero "Tony Boy" Boiardo. LaMorte remained outside the room during the ensuing conversation between the two. Boiardo told Rigo that if he wanted to get paid for the work he had done, and to continue to be paid, he would have to pay to Boiardo, in cash, 10% of all monies he received. Boiardo would, in turn, "take care of" the Mayor, council and "anybody else that has to be taken care of down there." Boiardo said this had been the deal with Sepede and that Rigo was going to be bound by it. Rigo, confronted by the demand, refused to pay. Boiardo said "everybody in Newark pays 10% or they don't work in Newark and they don't get paid in Newark. Look what happened to Killam! He didn't get paid or [sic] he didn't pay. He is not in Newark and he is going to sweat a long time before he gets what is owed him".

Faced with these threats, Rigo asked that the demand be lowered to 5%. Boiardo refused, and told Rigo that he

Boiardo, and his group had a plumbing supply firm (the Kantor firm, discussed below) which could cash Rigo's checks for a fee and issue him covering bills. Rigo, protesting that as an engineer he could not justify bills from a plumbing supply firm, told Boiardo that he would have to use his own corporation, Constrad, to cash the checks. Boiardo said that he did not care how Rigo got the cash, but that he had better get it. Rigo capitulated. Boiardo then told him he would be paid soon and that "somebody" would be in touch with him.

After Rigo received the first check, he received a call from someone who sounded like Boiardo, who asked if the payment was ready and said that someone would be down to pick it up that day. Later, Mario Gallo arrived and obtained the first payment. After Rigo received his second check, Gallo again picked up 10% in cash. On the third occasion, LaMorte was the man who phoned to ask if the payment was ready. LaMorte then came to the job site and introduced Rigo to Biancone, the Boiardo man designated to pick up this and later cash payments from Rigo. Rigo testified that he made these payments because he feared that, if he did not, he would cease to receive payments for work already completed.

In the meantime, action had been taken to bring the contractors into line. Biancone, Gallo and Sepede (when he was still alive) agreed that they and their coconspirators would require payments from contractors and suppliers totalling 10% of the contract price, or approximately one million dollars. Contractors interested in the work were advised of what was expected. Ralph Cestone, owner of the Verona Construction Company, was one of the contractors approached by Sepede, Gallo and Biancone. He refused to meet the demands or to join the joint venture of contractors who had agreed, and withdrew from the bidding. The Southside project was subsequently awarded to a joint venture of four separate contractors—G. Salvatore and Sons, Mal-Bros. Contracting Co., The Catt Corp., and C. F. Malanka and Sons, Inc.

The kickbacks were made through the bank account of the fictitious "Kantor Supply Company." Irving Kantor, who was in the plumbing supply business, was approached in 1962 by Biancone, who asked him to provide a check cashing service for certain contractors who had to pay cash to his boss, "Tony Boy" Boiardo. In return for this service, Kantor would receive 5% of the face value of all checks cashed. Kantor agreed and obtained Biancone's agreement to an arrangement whereby Kantor would set up a "dummy" company (Kantor Supply), which would submit phony invoices to the victim contractors who, in turn, would remit checks to Kantor Supply. Thereafter, 95% of the face value of the checks would be delivered, in cash, to Biancone.

The Kantor Supply account was used to process the payments on the Southside project. Through it passed checks from the joint venturers and from Gallo companies aggregating $9,698,880.98, out of which Biancone received cash of $911,445.00.

B. *The Southerly Extension*

In May 1965, a few months after he began work on the Southside project, Rigo was enlisted by the City to begin plans for a "Southerly Extension of Newark's water supply," which was urgently needed to alleviate a critical water shortage. At a June 1965 meeting at City Hall attended by Addonizio, LaMorte, Rigo, and Corporation Counsel Norman Schiff, Rigo informed the Mayor that Gallo did not make the sort of high pressure pipe required for the project; and that the contract would have to go to Interpace (Lock Joint). In that case, the Mayor said "Tony Boy better figure out a way to get something out of Lock Joint." Corporation Counsel Schiff asked "Will he get enough?" The Mayor replied, "If he goes after it, he'll get enough."

Shortly thereafter, in a meeting with Charles Albertson, an Interpace vice-president, Biancone said that Interpace could participate in the Southerly Extension only if

it agreed to pay a 10% kickback. Albertson refused. A few weeks later, with Albertson out of town, Biancone met with Interpace's Gillespie and again tried to extract an unspecified figure. Gillespie made no commitment, but informed Albertson of the meeting upon his return and told him to call Biancone. Albertson called Biancone, met him the following day, and finally agreed to a payment of 5%, or $35,000.00.

Albertson recognized that his company was the logical supplier. Time was of the essence and Interpace had two factories in the vicinity of the job site, one in New Jersey and the other in Maryland. Notwithstanding his belief that his company might have been able to obtain the contract despite Biancone, Albertson testified that with the obvious control that Mr. Biancone and his group had over the specifications and the inspectors on the job, he was fearful that if his company took the job, they would be harassed with delays, rejection of product and such, that their cost would probably far exceed the $35,000 he agreed to pay. He also testified that he was aware of how his company had been "closed out" of the Southside Sewer project, that although he did not want to pay this money, he did so because of a degree of fear for his personal and family safety, and fear for his corporation.

By July 1965, Rigo began to feel the burden of making the 10% payments on the Southside project while working at the same time without contract or pay on the Southerly Extension. He spoke to both Mayor Addonizio and LaMorte, but to no avail. The Mayor informed him that any contract on the Southerly Extension would have to be cleared by Boiardo.[4]

Rigo was later driven to Boiardo's home by LaMorte. Boiardo's response to Rigo's protestations was: "You pay

4. During the same conversation with the Mayor, Rigo asked him why he had ever left Congress to come into "this mess." Addonizio replied, "Simple. There's no money in Washington, but you can make a million bucks as the Mayor of Newark."

your ten percent or I'll break both your legs."[5] Rigo was also informed that the time might come when he would be called upon to collect the payments from the contractors as well. Soon thereafter, Rigo received a contract on the Southerly Extension and began receiving payments thereunder. He remitted 10% of these payments periodically to Boiardo through the conduit of appellant Vicaro.

The bids for construction of the Southerly Extension were taken in August 1965. The low bidder, however, was Verona Construction Company, the firm which had refused to go along on the Southside project. All bids were promptly rejected. The project was thereupon rebid. When the new bids were opened, Verona was again the low bidder, and it was awarded the contract. Subsequently, however, Verona President Cestone capitulated in the face of the City's withholding of progress payments and agreed to pay $100,000 in kickbacks. These payments were made through Rigo, who had been ordered by Boiardo to act as a go-between. Rigo also served as a conduit for the $35,000 in kickbacks made by Interpace.

In late 1967, LaMorte informed Rigo that there was "some kind of sensitive situation"[6] which prevented Boiardo from making his regular distributions to the Mayor and other city officials. LaMorte told Rigo that Boiardo therefore wanted Rigo to make these payments directly to these officials, that the price was $10,000 to each of eight councilmen and the Mayor. LaMorte indicated that he felt he was entitled to $25,000, and that Rigo should also give something to Mr. Schiff. Finally, he said that all

5. Boiardo's threats were economic as well: Later, in 1968, when he learned that Rigo was prospecting for work outside of New Jersey, he informed Rigo that "regardless of where [Rigo] obtained work he would expect his percentage."

6. About this time, the Governor's Select Commission in Civil Disorder, appointed to study the causes of the 1967 riots in the City of Newark, was taking evidence. As noted in appellant Addonizio's brief, the Commission issued a report in February 1968 in which it referred to a "pervasive feeling of corruption" in the Newark City Administration.

these payments would be deducted from the 10% that was being collected by Vicaro. Rigo made direct payments pursuant to this arrangement throughout 1968. The termination of the payments coincided roughly with the initiation of an Essex County Grand Jury investigation into certain financial dealings between Rigo and the Mayor.

II.
THE INDICTMENT

> Count I of the indictment charges that the defendants did wilfully, unlawfully and feloniously conspire with each other, and with other persons to the grand jury unknown, to obstruct, delay, and affect interstate commerce, as that term is defined in Section 1951 of Title 18, United States Code, and the movement of materials, equipment, supplies, and labor in such commerce by extortion, as extortion is defined in said section of the United States Code; that is to say, that the defendants did conspire to delay, to obstruct, to impede and to thwart construction undertaken on behalf of the City of Newark, the contractors performing such work and the timely and usual movement of supplies and materials needed to complete such projects, in order to obtain the property of contractors, engineers and others working on said municipal construction pursuant to said contracts, with the consent of such companies, their officers and their agents, said consent having been induced both by fear of financial injury and under color of official right.
>
> In violation of Section 1951 of Title 18, United States Code.

Counts II through LXIV each charge a substantive offense corresponding to single payments made by Paul Rigo to the conspirators "in furtherance of the plan and purpose to commit the offense charged in Count I. . . ." Of these sixty-three counts, II through X, which concern payments made to Boiardo's middlemen, do not name a specific

recipient of the payoffs, but simply allege that the "defendants obtained" varying sums on stated dates from Constrad, Rigo's corporation. Counts XI through LXIV, on the other hand, correspond to the period during which Rigo was making payments directly to city officials. Those counts name not only the specific sums and dates, but also the conspirator to whom the payment was made.

A. *Sufficiency*

Appellants claim that the indictment does not satisfy the test set forth in *Hagner v. United States*, 285 U.S. 427, 431 (1932):

> "The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction'."

It is clear from a reading of the indictment that every count alleges the "essential facts constituting the offense charged" therein. *Esperti v. United States*, 406 F.2d 148 (5th Cir. 1969); Rule 7(c), Fed. R. Crim. P. If there be any defect in the indictment, therefore, it must be in its failure either to apprise the defendants of the charges against them or to protect them against double jeopardy.[7]

In assessing the sufficiency of the conspiracy count, the *Hagner* test must be read in conjunction with the rule

7. ". . . [An] indictment which charges a statutory crime by following substantially the language of the statute is amply sufficient, provided that its generality neither prejudices defendant in the preparation of his defense nor endangers his constitutional guarantee against double jeopardy." *United States v. Achtner*, 144 F.2d 49, 51 (2nd Cir. 1944); *United States v. Palmiotti*, 254 F.2d 491, 495 (2nd Cir. 1958).

Laid down in *Wong Tai v. United States*, 273 U.S. 70, 81 (1927):

> "It is well settled that in an indictment for conspiring to commit an offense—in which the conspiracy is the gist of the crime—it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy, . . . or to state such object with the detail which would be required in an indictment for committing the substantive offense. . . . In charging such a conspiracy certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is necessary."

We are convinced from our own careful reading of Count I, which charges a specified continuing course of conduct over a particular five year period, that it more than meets the *Wong Tai* test and, as required by *Hagner*, both adequately apprised the defendants of the charges against them and protected them against any future double jeopardy.[8]

The sixty-three substantive counts allege payments of specific sums at specific times (fifty-four name the recipient as well), all in furtherance of the conspiracy. Since the conspiracy count is itself sufficient under Rule 7(c) and *Hagner*, it follows *a fortiori* that the substantive counts are sufficient as well.

B. *Multiplicity*

Relying heavily on this court's decision in *United*

8. *Russell v. United States*, 369 U.S. 749 (1962), relied on heavily by appellants, is of no help to them. To the extent the holding in *Russell* rests on the failure of the indictment to allege an essential element of the offense, it is inapposite, since here all the elements were charged. To the extent *Russell* relies on the failure of the indictment adequately to apprise the defendant of the charges against him, it is distinguishable, since the indictment in this case possesses none of the "cryptic" qualities found in *Russell*. *See Vandersee v. United States*, 321 F.2d 57 (3rd Cir. 1963).

States v. Provenzano, 334 F.2d 678 (3d Cir.), cert. den. 379 U.S. 947 (1964), appellants contend that the indictment in this case is multiplicitous. In *Provenzano* the Government proceeded on a single-count indictment, on the theory that the series of payments over a number of years was the result of a "single and unified" extortionate scheme. The defendant argued that each payment should have been alleged in a separate count. In upholding defendant's conviction, Judge Biggs (then Chief Judge), speaking for the court, held only that the Government *may* legally proceed on a one-count theory. *Provenzano* does not stand for the proposition urged by the appellants, namely, that the Government *must* proceed on such a theory.

Indeed, such a holding, on the facts of this case, would ignore the reality of the situation. We think the evidence clearly shows that each of the payments charged in the substantive counts manifested all the elements of the crime of extortion as defined in the Hobbs Act. The statute requires only (1) that the defendants induce their victims to part with property, (2) that they do so through the use of fear, and (3) that, in so doing, they adversely affect interstate commerce. The evidence is clear that Rigo parted with his property on each of the sixty-three alleged occasions.[9] We think the evidence is equally clear that on each occasion he was motivated to do so by fear of economic injury to himself and his companies. Rigo testified explicitly and at length about his fears concerning the possibility of delay in his obtaining progress payments and the difficulties he would have experienced acquiring other work, both in and out of the Newark area, if he did not continue delivering the payoffs. The jury could certainly find that this continuing element of fear was the impetus behind each of the payments made. It was not necessary for the government to prove a separate extortionate demand for each count. *United States v. Tolub*, 309 F.2d 286 (2d Cir., 1962). Finally, the Hobbs Act prohibits extortion which affects com-

9. As to the disputed counts III, VII and IX, see the discussion of duplicity, *infra*.

merce "*in any way or degree*." It is a reasonable inference (which the jury was entitled to draw) that each individual payment from Constrad to the conspirators, to the extent that it depleted the resources of an interstate company and affected its ability to function, affected interstate commerce to some degree and therefore constituted a separate, independent violation of the Hobbs Act. *United States v. Provenzano*, supra at 693.

Since each count charged, and the evidence proved, a distinct violation of the Act, the indictment was not multiplicitous.

C. Duplicity

Appellants attack count I on the ground that it "is so broad in its scope—including the period of time involved—that the indictment is duplicitous." Assuming appellants' objection goes to the fact that the count alleges a conspiracy to commit several substantive offenses rather than one, the law in this circuit is squarely against them. "[T]he conspiracy is the gist of the offense, and though the count charges an agreement to commit several crimes . . . each one of which may be the basis for an indictment, the count charges but one offense under 18 U.S.C. §371." *United States v. Knox Coal Co.*, 347 F.2d 33, 39 (3d Cir.), cert. den. 382 U.S. 904 (1965); *Frohwerk v. United States*, 249 U.S. 204 (1919).

Appellants advance only a slightly more substantial argument as to counts III, VII and IX, which charged extortions from Constrad, Inc., of $37,000, $20,000, and $20,000 respectively. The proof at trial revealed that only a fraction of the money paid on each of these three occasions actually belonged to Constrad; the balances constituted payments from Cestone, which were merely being funneled *through* Constrad.[10] Appellants therefore argue that, while these three counts may not have been duplicitous on their face,

10. Of the $37,000 alleged in Count III, $30,000 was Cestone's. Similarly, $10,000 involved in Count VII and $10,000 involved in Count IX was Cestone's.

they were *in fact* duplicitous in that they each implicitly charged two crimes.

The argument is specious. The real thrust of this argument is that the Cestone payments were irrelevant to the charge in counts III, VII and IX. However, as to all three counts, the Government proved all the elements of a Hobbs Act violation as to Constrad, the proof varying from the indictment only as to the amount extorted. Since the evidence as to the Cestone money was admissible to prove the conspiracy count at any rate, we are of the opinion that the discrepancy between indictment and proof on these three counts constituted merely a nonprejudicial variance which does not warrant reversal.

Appellants' other arguments as to duplicity are also without merit.

III.

PRE-TRIAL MOTIONS

A. *Failure to Grant a Continuance and Retransfer*

As one might expect, a not insubstantial amount of pre-trial publicity accompanied the unfolding of this case, concentrated largely in the areas around Newark. Appellants assert that the trial court, through a number of its rulings, failed to adequately shield the trial from the effects of that publicity.

Appellants Biancone and Vicaro along with co-defendant Boiardo, made pre-trial motions for a change of venue to another district pursuant to Fed. R. Crim. P. 21(a), coupled with a request for a continuance of six months. Alternatively, they sought a continuance of one year with the trial to be held within the District of New Jersey. While acknowledging that the volume of pre-trial publicity was "both extensive and intensive," the court denied these motion,[11] stating that

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11. A later motion by Addonizio for a continuance was also denied by the court.

> To presume, in advance of the voir dire examination of the prospective trial jurors, that the extent of the pre-trial publicity in this case negates the selection of a fair and impartial jury represents a premature and unwarranted supposition. This court is satisfied that a properly conducted voir dire will adequately protect the rights of these defendants to a fair trial. . . . If the voir dire disproves this assumption, the relief requested could then be considered.
>
> *United States v. Addonizio*, 313 F. Supp. 486, 493-494 (D.N.J. 1970).

The court did, however, transfer the proceedings from Newark to Trenton, observing that

> in view of the concentration of public interest and news coverage in the Newark area, the court is convinced that the jury selection process will be facilitated by the transfer of these proceedings from the Newark to the Trenton vicinage of the district and that such a transfer will not unduly burden or inconvenience either the defendants or the witnesses.
>
> *Id.*, at 494

Shortly thereafter, all defendants moved for a retransfer of the proceedings to the Newark vicinage on the ground that the daily trip to Trenton would work an undue hardship on the defendants, counsel, and witnesses. The court denied this motion as well because it concluded that the degree of inconvenience was clearly outweighed by "the probability that the jury process selection here in Trenton will be substantially facilitated."

The court continued to deny repeated motions for a continuance throughout the voir dire.

We find no error in any of these rulings.[12] The grant

12. Appellants do not challenge the trial court's denial of a change of venue, perhaps because such a challenge would be manifestly inconsistent with their attack upon the court's refusal to retransfer the proceedings to Newark.

or denial of a continuance is a matter within the discretion of the trial judge, and an abuse of that discretion will not be found unless a denial of a continuance is "so arbitrary as to violate due process" under the circumstances. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1963). *See United States v. Greenberg*, 419 F.2d 308 (3d Cir. 1969). Here there was no abuse of the trial court's discretion. Its denial of a continuance was conditioned on the court's ability to select an impartial jury panel. Since we hold infra that the voir dire examination of prospective jurors was adequate and that the jury ultimately selected was impartial, there is no basis for finding an abuse of discretion in the denial of a continuance. Two additional factors have influenced our decision: First, as already noted, the trial court transferred the proceedings to the Trenton vicinage, where it was felt that the effects of pretrial publicity would be minimized; and second, the trial court was informed *in camera* by the Government that Irving Kantor, one of the chief prosecution witnesses, was in a terminal condition and could expire at any time. Kantor became the Government's first witness, and died a few days after testifying.

The appellants' contention that the trial court's transfer of the proceedings to Trenton violated Rule 18, Fed. R. Crim. P., and Rule 11a of the Local Rules of the District of New Jersey is frivolous. Rule 18 provides that the "court shall fix the place of trial *within the district* with due regard to the convenience of the defendant and the witnesses." (Emphasis supplied) The trial court's rulings, quoted above, disclose an ample regard for the convenience of the defendants. The court's determination that, on balance, other factors outweighed the consideration of convenience does not evince a lack of "due regard" therefor. The court's ruling was therefore a proper exercise of the discretion conferred by Rule 18.

Local Rule 11a vests in the District Court Clerk the function of assigning cases to Camden, Newark, or Trenton, and provides that in doing so he shall "take into consideration the residence of the defendant, the convenience of liti-

gants, counsel and witnesses, and the place where the cause of action arose." Appellants argue that once this case was assigned to Newark, the trial court was without power to overrule the considered judgment of the Clerk. The appellants ignore the last sentence of Rule 11a, which makes it clear that the trial court has such power:

> The place so fixed shall be the place of trial and of all proceedings in the cause, *unless changed by order of the court*. (Emphasis supplied)

B. *The Motions for Severance*

Appellant Addonizio originally made a pretrial motion requesting severance from all his co-defendants. Upon oral argument, the motion was modified to request severance only from those defendants who were not public officials—i.e., the "Boiardo Group," Boiardo, Vicaro, and Biancone—and from defendant Phillip Gordon, who was known by the defendants to have admitted receiving illicit payments from Paul Rigo. The motion was denied, as were other severance motions made by Addonizio throughout the course of the trial.

Addonizio contends that it was error not to sever him from "Boiardo Group" members Vicaro and Biancone[13] for two reasons. First, he contends that he was deprived of the benefits of pre-trial discovery because the inclusion of allegedly "underworld" defendants in the trial led the Government to shield the identity of prospective witnesses in order to protect them from threats, intimidation, and possibly physical harm. There is no merit in this argument, however, since in no event is the Government required to divulge the identity of its witnesses in a noncapital case. *United States v. Persico*, 425 F.2d 1375 (2d Cir. 1970); 18 U.S.C. §3432. Even if Addonizio had been severed, therefore, he would not have been legally entitled to a list of witnesses.

Second, Addonizio contends that failure to grant him a severance, at least after he had testified, deprived him of his right to argue to the jury in closing that, while he had

13. As noted in footnote 1, supra. Boiardo himself was severed during trial due to illness.

freely taken the stand and denied his guilt, his co-defendants had failed to do so. Addonizio cites *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962), which clearly supports his position that a severance was required. However, we share the concern expressed by Circuit Judge Bell in his concurrence in *DeLuna*. Discussing the right of the co-defendant Gomez' right to comment upon DeLuna's failure to take the stand, Judge Bell stated:

> If Gomez, or others similarly situated, claims the right which the majority holds that he has to comment on the failure of de Luna to testify, a mistrial will be required at the instance of his co-defendant who did not take the stand. In addition, severance in advance of trial may be required where there is a representation to the court that one co-defendant does not expect to take the stand while another or others do expect to testify, and claim their right to comment upon the failure of the other to testify. This would eliminate joint trials, or vest in a defendant the right to a mistrial during final arguments, or in the alternative create built-in reversible error, all in the discretion of the defendants.
> De Luna at 155-156

Judge Bell concluded that a defendant has no right to comment upon a co-defendant's failure to take the stand. We hesitate to go so far. Rather, we believe the better rule was stated by Chief Judge Hastings in *United States v. Kahn*, 381 F.2d 824, 840 (7th Cir. 1967):

> The question as we see it is *how essential is it to a fair and complete defense, an attribute of a fair trial, that defendants be permitted to comment upon a co-defendant's exercise of his right against self-incrimination.* The procedural difficulties and the complication of joint trials arising from the rule suggested by dicta in De Luna are so great that we cannot say there is an absolute right, without reference to the circumstances of defense at trial, for a defendant to comment on the refusal of a co-defendant to testify. We think there must

be more to justify the disintegration of a trial, such as a conspiracy trial, in which there is a cohesion of crime alleged, defendants charged, and proof adduced. *There must be a showing that real prejudice will result from the defendant's inability to comment.* (Emphasis supplied)

The court further observed that, while there was some inconsistency between the defenses at trial, "the degree of antagonism . . . [was] not as great as that in *DeLuna* where the defenses were mutually exclusive." The court therefore held that, since the testimony "did not present the jury the dilemma of mutually exclusive defenses, with no evidentiary basis for judgment between them, in which a comment on the failure to testify would indicate which horn of the dilemma should be seized . . . ," the defendants in question suffered no prejudice from their inability to comment upon their co-defendant's failure to testify. *Kahn*, at 841.

Here likewise, there was no mutual exclusivity among the defenses, i.e., nothing to indicate that "if one defense were believed, the other[s] could not be." *Kahn*, at 841. Nor were there any other prejudicial circumstances which would have justified the disintegration of a conspiracy trial of this magnitude. We therefore conclude that Addonizio's right to a fair trial was fully protected when the trial court, although denying his motion for severance, allowed him to comment at length in closing argument upon his own willingness to testify, but not upon his co-defendants' failure to do so.

C. Bill of Particulars

In their pre-trial motions for bills of particulars, the appellants made hundreds of requests for information concerning the Government's case. The trial court denied the great majority of requests, but did order the Government to

promptly file and serve a Bill of Particulars of the

Indictment herein, particularly setting forth:
With respect to Counts II through X, inclusive:
The names of those Defendants, or other persons, through whom the Government alleges the Defendants obtained the sums of money from Constrad, Inc. . . .
With respect to Counts I through LXVI, inclusive:
A more specific factual statement with regard to the charges contained in the Indictment that the consent of the alleged victims of the charged extortions was "induced both by fear of—or by the wrongful use of fear of—financial injury and under color of official right." [14]

The Government complied with this order and, in addition, provided the defendants with copies of over 900 exhibits in advance of trial, pursuant to a separate discovery order.

In this court, the appellants complain mainly of the trial court's failure to grant those Count I particulars concerning what construction contracts were involved, who the victims of the alleged extortions were, and when the alleged conspiratorial acts took place.

"The purpose of a bill of particulars is to inform the defendant of the nature of the charges brought against him to adequately prepare his defense, to avoid surprise during the trial and to protect him against a second prosecution for an inadequately described offense." *United States v. Tucker*, 262 F.Supp. 305, 308 (S.D.N.Y. 1966). A bill of particulars should fulfill this function "when the indictment itself is too vague and indefinite for such purposes." *Wyatt v. United States*, 388 F.2d 395, 397 (10th Cir. 1968); *United States v. Haskins*, 345 F.2d 111, 114 (6th Cir. 1965).

The 1966 amendment to Rule 7(f), Fed. R. Crim. P., eliminating the requirement that cause be shown before a bill of particulars may be ordered, is "designed to encourage a more liberal attitude by the courts towards bills of

14. The trial court submitted the case to the jury only on the "fear of financial injury" theory.

particulars without taking away the discretion which courts must have in dealing with such motions in individual cases." Notes of Advisory Committee on Rules, 18 U.S.C. Rule 7(f). The net result of the change seems to have been to increase the instances in which particulars are granted, thus contributing to a desirable decline in the "sporting theory" of criminal justice.[15] *United States v. Jaskiewicz*, 278 F.Supp. 525 (E.D.Pa. 1968).

This liberalization has, out of practical necessity, been limited in some important respects, however. It is still firmly established, for example, that a defendant is entitled neither to a wholesale discovery of the Government's evidence, *United States v. Birrell*, 263 F.Supp. 113, 115 (S.D. N.Y. 1967), nor to a list of the Government's prospective witnesses, *United States v. Jaskiewicz*, supra; *United States v. Palmisano*, 273 F.Supp. 750 (E.D.Pa. 1967).[16] In the final analysis then, the granting of a bill of particulars remains a discretionary matter with the trial court, and it is still "obviously a matter of degree how far an accused must be advised in advance of the details of the evidence that will be produced against him, and no definite rules are possible." *United States v. Russo*, 260 F.2d 849, 850 (2nd Cir. 1958). The denial of a motion for a bill of particulars does not amount to an abuse of discretion unless the deprivation of the information sought leads to the defendant's inability to adequately prepare his case, to avoid surprise at trial, or to avoid the later risk of double jeopardy.

We are unable to say that there has been an abuse of discretion on the facts of this case. From the face of the in-

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15. *See* Brennan, "The Criminal Prosecution: Sporting Event or Quest for Truth," 1963 Wash. U.L.Q. 279.

16. Where, however, a defendant seeks legitimate information, he may not be denied it merely because the *effect* of providing it is to divulge the names of government witnesses or the details of the government's evidence. *United States v. Lipshitz*, 150 F. Supp. 321 (E.D. N.Y. 1957); *United States v. Smith*, 16 F.R.D. 372 (W.D. Mo. 1954).

dictment, the defendants were aware (1) that the Southside and Southerly Extension projects were two of the construction jobs connected to the conspiracy, and (2) that Constrad was one of the alleged victims of the extortion. From the bill of particulars, the defendants were aware of the nature of the threats allegedly made to the victims. From the exhibits delivered by the Government before trial, they knew of the involvement of Rigo, the Killam firm, Irving Kantor and his "Supply" company, the joint venturers on the South Side project, and Verona Construction Company. It is true that the Government did not, at the pre-trial stage, weave the information at its command into the warp of a fully integrated trial theory for the benefit of the defendants, nor were they required to do so. *United States v. Louis Carreau, Inc.*, 42 F.R.D. 408, 411 (S.D.N.Y. 1967). Nor were the defendants made aware of every detail of the Government's case, most significantly, perhaps, the pressure to revise the specifications to permit the use of rubber and concrete joints on the Southside project. We are unable to say, however, that the defendants were left so uninformed that they were prevented from adequately preparing for trial.[17] Indeed, apart from their general protestation of surprise, appellants have pointed to no single instance in which they were prejudiced by lack of information. Lacking a showing of prejudice, we can find no abuse of discretion. *United States v. Kafes*, 214 F.2d 887 (3rd Cir. 1954); *cf.*, *United States v. Fioravanti*, 412 F.2d 407 (3rd Cir. 1969).

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17. In this connection, notice may be taken of the *in camera* observation of defendant Boiardo's counsel, after three weeks of Government testimony, that "there hasn't been a surprise yet in the Government's case because in preparing our defense, we knew who all the witnesses were. . . . [I]n the process of the last three months of investigating and talking to people everywhere we could, we obviously came upon the names of the various companies that were involved in the case."

Appendix A

IV.

THE JURY SELECTION

The voir dire examination of prospective jurors was conducted exclusively by the trial judge. Counsel were not permitted to participate, although they submitted proposed questions, many of which were asked by the court. The preponderance of the voir dire was devoted to determining the extent of each prospective juror's exposure to pretrial publicity and the effect of that exposure upon his ability to judge the defendants impartially. Invariably, any prospective juror who indicated he knew something about the case was questioned further as to the nature and extent of his exposure, while at the same time being admonished not to go into the *substance* of what he had read. Typically the inquiry centered around the particular newspapers in which the prospective juror had seen case-related stories and whether he had read entire articles or only portions thereof (or, in some instances, merely headlines). Prospective jurors were then questioned at some length as to whether they had formed any opinion as to the guilt or innocence of the defendants and whether they could judge the defendants impartially despite some exposure to pretrial publicity.

With one exception,[18] the appellants do not challenge the final composition of the jury. Rather, they challenge the method of examining the prospective jurors on voir dire. More specifically, they argue that

(a) Counsel should have been allowed to examine the

18. The court rejected a challenge for cause of juror Mary Opsuth. In response to the court's inquiry as to whether she knew of any reason why she should not serve, Miss Opsuth responded, "No, I'm scared, that's all." Although appellants object to a juror who was "scared," it is clear from her subsequent response ("Well, I guess after you sit and listen to it you kind of get used to it") that she was merely referring to the sort of nervousness with which many novice jurors are quite naturally afflicted. Indeed, she testified specifically that her being "excited or scared" would not affect her ability to deliberate and be fair.

prospective jurors; and that (b) The court erred in not examining each prospective juror individually, out of the presence of the rest of the panel, as to the *content* of the articles which he had read concerning the case.

As to participation of counsel, the court's ruling was clearly in conformity with Rule 24(a), Fed. R. Crim. P.,[19] and with the practice which apparently is followed in most federal trial courts.[20] There are no circumstances in this case which might render this ruling an abuse of discretion,[21] and we find no error therein. Nor did the court abuse its discretion in its choice of questions submitted by counsel.

In support of their assertion that the trial court should have inquired into the contents of the articles read by each prospective juror rather than relying upon the juror's own protestation of impartiality, appellants rely heavily on three cases. In *Irvin v. Dowd*, 366 U.S. 717 (1961), the petitioner was convicted of murder and sentenced to death in a trial in a small Indiana town which was preceded by virulent and inflammatory publicity. Nearly 90% of the veniremen examined admitted to having formed an opinion adverse to the petitioner. Eight of the twelve jurors who returned the verdict were among that 90%. They had been allowed to serve, however, because

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19. "The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper."

20. The Jury System in the Federal Courts, Report of the Judicial Conference Committee on the Operation of the Jury System, 26 F.R.D. 409, 466 (1960).

21. *Cf.*, *Silverthorne v. United States*, 400 F.2d 627, 640 (9th Cir. 1968).

they had declared that they would be able to set aside those opinions and decide the case impartially on the basis of the evidence presented in court. The Supreme Court held that petitioner had been convicted in violation of his constitutional right to be tried before an impartial jury. Speaking of the eight jurors with preconceived opinions, Justice Clark stated:

> The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man. . . . No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight.
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> 366 U.S., at 727-28

Similarly, in *United States ex rel. Bloeth v. Denno*, 313 F.2d 364 (2nd Cir. en banc, 1963), eight of the sixteen jurors and alternates had formed opinions of guilt before trial. In granting the writ, the court of appeals observed that asking the jurors if they could be impartial "placed on those individuals a burden we think impossible to be borne, in light of the nature of the publicity, the high proportion of jurors holding opinions of guilt, the length of time the opinions had been held and their persistence." [22]

In *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968), every juror had some knowledge of the case. Nearly 30% of the veniremen questioned expressed opinions of the defendant's guilt. There had been voluminous pre-

22. 313 F.2d at 372. The pretrial publicity labelled the defendant as the "Mad Killer" who had terrorized the community by committing three senseless murders; his confession was published in the papers, along with the District Attorney's opinion that he had to "get the chair", and the newspapers intimated that, were the defendant found not guilty by reason of insanity, he "would be free —perhaps to kill again."

trial publicity. The court of appeals held that, under those circumstances, the trial court should have made some "effort to ascertain *what* information the jurors had accumulated," rather than relying on the jurors' own subjective assessment of the effect of that information upon their ability to remain impartial.

On its facts, however, the instant case differs significantly from each of the foregoing cases. Unlike *Irvin* and *Bloeth*, the publicity here was neither virulent nor inflammatory,[23] and no empanelled juror admitted having formed an opinion about the case. Unlike *Silverthorne*, the voir dire was neither cursory nor erratic. On the contrary, the trial court here carefully and painstakingly assured itself that the jurors selected were impartial and unbiased by any exposure to the publicity or other influences. Prospective jurors who had formed an opinion as to guilt or innocence of any of the defendants were excused *sua sponte* by the court. Prospective jurors who had discussed the case were similarly excused, regardless of the nature or extent of the discussion or their own expression of impartiality. The court dismissed on its own motion each prospective juror who indicated extensive exposure to pretrial publicity, *without regard* to protestations of impartiality. As a result, of the twelve jurors who eventually returned the verdicts, three had read nothing at all about the case, six had read "only headlines" or only "vaguely", recalled having skimmed articles, and three had read articles only "infrequently." In addition, several professed a lack of interest in the case, since the alleged acts of public misconduct had taken place in another part of the state. In sum, we are convinced upon review of the record that appellants were tried by an impartial jury and that there is no

23. Counsel for appellant Addonizio admitted as much before the district court:

> "There was no yellow press, no improper press. I don't think there has been any yellow press.
>
> . . . [I]t has been perfectly plain, good reporting all the way right up until now . . ."

merit to their claim of constitutional infirmity either in the degree of pretrial publicity or in the court's ruling concerning the conduct of the voir dire. *Beck v. Washington*, 369 U.S. 541, 556 (1962).

We feel impelled to add, however, that we find much merit in the method of voir dire recommended in the American Bar Association's Standards Relating to Fair Trial and Free Press, §3.4(a) (Approved Draft, March 1968). As an exercise of our supervisory powers over the district courts in this circuit, therefore, we recommend that in cases hereafter in which there is, in the opinion of the court

> a significant possibility that individual talesmen will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to his exposure shall take place outside the presence of other chosen and prospective jurors. . . . The questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how his exposure has affected his attitude towards the trial. . . .
>
> *Standards*, §3.4(a).

V.

THE EVIDENTIARY RULINGS

A. *The Kantor Account*

Appellants question both the manner in which Irving Kantor's testimony was taken and the ultimate admissibility thereof.

1. *The Taking of Testimony*

After denying appellants' motion, pursuant to Rule 15, F. R. Crim. P.,[24] to have Kantor's testimony taken by

24. Rule 15 provides, in part:

"(a) . . . If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to

deposition, the Court, upon motion of the United States and pursuant to 28 U.S.C. §141,[25] directed a special session of the Court to be convened at the Veterans' Hospital in East Orange for the purpose of determining whether Kantor was competent to testify and, if so, for the taking of his testimony before the jury.

We find no error in these rulings of the Court. Section 141 clearly provides authority for the action taken. *United States v. Tomaiolo*, 249 F.2d (2nd Cir. 1957). While such a course "should be followed only in cases of real emergency," *Id.*, at 694, we have no doubt from the record that such an emergency here existed. Kantor had by this time become completely immobilized and his death was known to be imminent. It was certainly well within the sound discretion of the Court to order his testimony taken at the commencement of trial and at the only practicable location, the hospital in which he was confined. It was a valid exercise of the court's discretionary power to secure Kantor's actual attendance at trial by convening a special session at the hospital.

We likewise find no merit in appellants' complaint over the court's refusal to permit physicians chosen by the defense to examine Kantor in order to determine his competency to testify. The court had before it both the opinion of Kantor's physician, Dr. Leonard Granick, that Kantor's "understanding and perception are normal," and Kantor's hospital chart, which indicated that he "appears to be well oriented, in good contact with his environment, and shows no impairment of memory." In addition, the court ex-

Note 24—Continued

take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a defendant and notice to the parties order that this testimony be taken by deposition.

25. "Special sessions of the district court may be held at such places in the district as the nature of the business may require, and upon such notice as the court orders.

"Any business may be transacted at a special session which might be transacted at a regular session."

amined Kantor personally and at length. The court's conclusion that Kantor was competent to testify is amply supported both by these pre-testimonial indices and by Kantor's testimony itself. His testimony clearly indicates that he was in complete control of his faculties of comprehension and communication.

There was no error in the court's use of Mrs. Kantor as an "interpreter" during her husband's testimony. Kantor was unable to speak above a loud mumble and apparently had difficulty making himself understood at times. According to Dr. Granick, however, Mrs. Kantor's constant attendance at her husband's bedside during the period of his deterioration instilled in her the ability to understand his words almost without hesitation. It was Dr. Granick's opinion that Mrs. Kantor "could act very well as an interpreter." For this reason, the court, after examining Mrs. Kantor thoroughly as to her ability to translate accurately and any possible motives she might have to distort her husband's testimony, allowed her to act as the conduit through which her husband's words were relayed to the jury. We find this procedure to have been a sound exercise of the court's discretion in "appoint[ing] an interpreter of its own selection. . . ." F. R. Crim. P., Rule 28(b).

2. *The Admissibility of the Kantor Testimony*

Appellants challenge the admissibility of the Kantor testimony on several grounds. First, they argue that there was no evidence connecting the Kantor account to any defendants except Biancone (and Boiardo, whose case was severed), and that evidence of the existence of the account was inadmissible as to these defendants. This is a frivolous argument. Since, as we hold *infra*, there is ample evidence connecting each appellant to the conspiracy charged in Count I, and since there was testimony that Boiardo had mentioned the existence of a dummy account used to disguise payments made pursuant to the extortionate scheme, evidence of the existence of the Kantor account was admissible against all the conspirators despite the lack of proof directly connecting them therewith.

Appellants have also argued that, even assuming that evidence of the *existence* of the account was admissible, the further evidence of the nearly one million dollars in payments deposited therein, and subsequently withdrawn therefrom (minus five percent) by Biancone was inadmissible, since there was no evidence connecting these particular monies with the conspiracy charged in Count 1.

It was the Government's theory at trial that the $928,665.67 in checks given to Kantor by Biancone in exchange for phony invoices was in fact the 10% payment extorted from the contractors and suppliers on the Southside project. The $911,445.00 in cash generated following Kantor's deduction of his 5%, the Government contends, constituted the sum of the payoffs which finally made their way into the hands of the conspirators.

Appellants first attack this hypothesis on the ground that the evidence is, in several respects, inconsistent therewith. They point out that some of the phony invoices purported to be for supplies needed for projects totally unrelated to the Southside project. This, of course, is of no significance whatever. Since the invoices were fictitious anyway, it would not have mattered if *none* of the invoices related to the Southside project; they were merely a devious expedient.

Appellants also point out that several of the companies depositing checks in the Kantor account contributed amounts greatly at variance with the 10% mean figure.[26] This also is of no significance. It is quite possible, and the jury was certainly entitled to infer, that, as a matter of procedure agreed upon among themselves, certain of the companies were to be used to generate a disproportionate percentage of the payments, and that distribution of payments to those companies from the joint venture were therefore adjusted accordingly. The jury was entitled to infer that the percentage figure was negotiable and adjustable from time to time. (Such a procedure would have been

26. See Government Exhibit No. G-1300, attached hereto as an appendix.

closely analogous to that used in connection with the Southerly Extension project, in which Constrad served as a conduit for payoffs from Verona Construction Co. and Interpace.) Nor can we attach any significance to the fact that Mal-Bros., one of the joint venturers, paid more into the Kantor account than it received in periodic payments from the joint venture. The joint venture agreement provided that these periodic payments did not compose the entire ultimate distribution of profits from the project.

As a final alleged inconsistency, the appellants point out that, although payments to the joint venture from the city were completed in November 1966, three of the payments into the Kantor account were made in 1967 and 1968. The late dates of these payments were matters for the jury, however. The jury was entitled to infer, as appellants now urge, that these dates are inconsistent with the Government's theory that the payments were in connection with the Southside project. The jury was equally entitled to infer, however, that the companies involved had decided for one reason or another, or had been compelled by financial considerations (e.g., other pressing obligations or liquidity problems), to defer the final payments into the years immediately following the city's last installment. This court cannot, therefore, accept appellants' argument that *as a matter of law* these late payments were inconsistent with the Government's theory of the case.

In addition to these alleged inconsistencies, the appellants cite what they consider to have been a total lack of affirmative proof connecting the money flowing through the Kantor account with the Southside project. In the words of appellant Biancone, "what the Government did was to put almost $1,000,000 into Biancone's hands without ever connecting that money to this case." Our examination of the record, however, reveals abundant evidence from which a jury could infer that the payments into the Kantor account *must* have been in connection with the Southside project. This evidence includes the following:

(1) Cestone's testimony regarding conversations with

John Sepede (who, along with Gallo and Boiardo, had allegedly set up the Southside extortion scheme) in June and July of 1964, in which Sepede estimated the value of the Southside contract as "between 10 and 12 million" and the required kickback as one million. These estimates, repeated by Sepede at a meeting with Cestone in August 1964, are very close to the $9,698,880.98 actually paid out by the city on the contract and the $911,445.00 which ultimately emerged from the Kantor account. This testimony alone, coupled with the fact that all payments into the Kantor account were made either by companies engaged in the Southside project or, in Gallo's case, by companies related by common ownership to other companies which were engaged in the project, was sufficient to support an inference connecting the Southside project to the Kantor payments. But this was not the only evidence.

(2) Cestone testified that, at their August 1964 meeting, Sepede informed him that, as far as making the required kickback was concerned, "unlike other suppliers Mr. Gallo would carry his own freight." This is consistent with the evidence that Gallo, of all the suppliers on the Southside project, was the only one to make payments into the Kantor account.

(3) Rigo's March 1965 conversation with Boiardo, following Sepede's death, makes it clear that 10% was being required of everyone who worked on the Southside project. Rigo related the conversation:

> B. "This job you have done [down?] there on the South Side . . . that was set up by Johnny Sepede and me, and Johnny Sepede and I had an understanding and that understanding is that you paid 10% of what you get on that job."
>
> R. "I can't pay you 10%."
>
> B. "You will pay 10% and you will pay it in cash."
>
> R. "We can't pay you 10%. What are we getting for paying you 10%?"

B. "There is a lot of mouths to feed in City Hall, you pay me the 10%. I take care of the Mayor and I take care of the Council I take care of anyone else that has to be taken care of down there . . . ."

When Rigo said he couldn't pay with cash, Boiardo told him of the "plumbing supply company" that could generate cash for him through the use of phony vouchers. Since, as an engineering firm, Capen-Rigo could not even pretend to need plumbing supplies, Rigo decided to generate the cash instead through his other company, Constrad.

(4) All Salvatore checks introduced into evidence, including the $186,182.20 in payments into the Kantor account, were in fact drawn upon a special account in the name of the *joint venture* (C. Salvatore & Sons, Inc.—Southside Project), the only purpose of which was the construction of the Southside project.

All of appellants' allegations of error as to the Kantor account are therefore without merit.

B. *The Gordon Transcript*

At trial, the Government introduced portions of the grand jury transcript containing testimony of defendant Gordon, who had been a councilman, and later corporation counsel, of the City of Newark. The gist of Gordon's testimony before the grand jury (he did not testify at trial) was that on each of two separate occasions he had personally accepted from Paul Rigo two unmarked brown envelopes, one of which he kept for himself and one of which he personally gave to the defendant Anthony Giuliano (who died before trial). On each occasion, in the envelope he kept for himself, Gordon found $2,000 in cash. He testified that Rigo had given him this money in connection with the "Water Authority jobs." Following admission of this testimony, the court instructed the jury to consider it only in connection with defendant Gordon and not in any way in connection with his codefendants.

Appellants attack the admission of this transcript on

the basis of *Bruton v. United States*, 391 U.S. 123 (1968). There, the Supreme Court held that a confession of a defendant who does not take the stand may not be introduced into evidence at their joint trial if it inculpates a co-defendant, limiting instructions notwithstanding. Such a procedure, the Court ruled, violates the Sixth Amendment's confrontation clause. Although conceding that Gordon's testimony in no way implicates them directly, appellants have nonetheless argued that Gordon's testimony directly corroborated that of Rigo, who testified to the same transactions. This highly-believable corroborative testimony, they argue, had the effect of enhancing Rigo's credibility *generally*, which in turn made it more likely that the jury would believe Rigo's testimony concerning his illegal dealings with the appellants themselves. Thus, the appellants conclude that the Gordon testimony did indeed prejudice them and, under *Bruton*, should not have been admitted into evidence.

Bruton is not apposite however. Unlike *Bruton*, Gordon's testimony before the grand jury referred only to Rigo in no way directly implicated the appellants. Its purpose was to prove Gordon's participation in the conspiracy and was accompanied by appropriate limiting instruction. To whatever limited extent it may have enhanced Rigo's credibility, its effect was greatly mitigated by extensive and relentless cross-examination which Rigo underwent over a period of several days. Under these circumstances, we hold that the Sixth Amendment rights of appellants were not violated. Cf., Posey v. United States, 416 F.2d 545, 550 (5th Cir.) cert. den'd. 397 U.S. 946 (1970), United States v. Lipowitz, 407 F.2d 597 (3d Cir.) cert. den'd. 395 U.S.

C. *The Co-Conspirators' Exception*

There was much testimony as to statements made by various co-conspirators during the course, and in furtherance, of the conspiracy. Since the court properly instructed the jury that these statements could not be considered against any defendant unless there was sufficient evidence *aliunde* connecting that defendant to the conspiracy,

Glasser v. United States, 315 U.S. 60 (1942), there was no error, under the traditional federal hearsay standards, in their admission into evidence. Appellants attack the traditional co-conspirators rule, however, on Sixth Amendment confrontation grounds. They argue that the "rationale" of the Supreme Court's decisions in *Pointer v. Texas*, 380 U.S. 400 (1965), *Douglas v. Alabama*, 380 U.S. 415 (1965), *Bruton v. United States*, supra, and *California v. Green*, 399 U.S. 149 (1970) requires a holding that the co-conspirator's exception is violative of the confrontation clause. This court has rejected this argument in the past, *United States v. American Radiator & Standard Corp.*, 433 F.2d 174 (3d Cir. 1970), *Parness v. United States*, 415 F.2d 346 (3d Cir. 1969), and we see no basis in policy or in the Supreme Court's recent decision in *Dutton v. Evans*, 400 U.S. 74 (1970), which causes us to accept it now. Nor do we believe that in the circumstances of this case, the admission of this evidence offends due process. *Dutton v. Evans*, supra (Harlan, J., concurring).

D. *The Threats to Rigo*

Rigo testified that, in January 1969, when investigations were beginning into the situation in Newark, Vicaro warned him: "Stay away from the Pope (Addonizio). Keep your mouth shut and remember you have a pretty daughter in Suffern." Rigo said he "took it to be a threat against my daughter. . . ." In March 1969, prior to his testifying before the Essex County Grand Jury, Rigo found an anonymous note on the seat of his car which read "This could have been a bomb. Keep your mouth shut." This was followed by an anonymous phone call in August 1969 which warned him to "[k]eep the hell away from the Federal Building."

Appellants claim error in the admission of this testimony on two grounds: (1) there was no evidence connecting the author of the note or the maker of the call with the appellants or their alleged co-conspirators, and (2) the evidence as to all three threats was both irrelevant to the issues at trial and highly inflammatory in nature.

It is clear that the connection between a message (either oral or written) and its source may be established by circumstantial evidence. VII Wigmore on Evidence, §2155(1)(b); *United States v. Greenberg* ——— F.2d——— (3d Cir. 1971) As Judge Merrill observed in *Carbo v. United States*, 314 F.2d 718, 743 (9th Cir. 1963)

> The issue for the trial judge in determining whether the required foundation for the introduction of the evidence has been established is whether the proof is such that the jury, acting as reasonable men, could find its authorship as claimed by the proponent. The scope of appellate review upon this issue is confined to determining whether the admission constituted abuse of judicial discretion in determining whether a prima facie case had been made out." (footnotes omitted)

The pattern of physical intimidation of Rigo by both Boiardo and Vicaro, coupled with "the manner in which the warning[s] so obviously fitted into the conspiracy scheme," could have led reasonable men to believe that the threats had been made "by or at the direction of one of the conspirators."[27]

Since the indictment was predicated on the "fear of economic injury" theory, appellants correctly point out that *physical* threats would clearly not be relevant to prove the extortionate nature of the conspiracy. They ignore, however, the crucial fact that the *conspiracy itself* continued up to the time of the indictment in December 1969, well after the threats were received. To the extent, therefore, that the threats constituted an effort to prevent an ongoing, profitable extortion conspiracy from being aborted—as distinguished from an attempt to conceal a conspiracy after its completion, *Krulewitch v. United States*, 336 U.S. 440 (1949)—they were acts done in furtherance of the conspiracy's existence.

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27. *United States v. Carbo*, supra, at 743.

VI.

SUFFICIENCY OF THE EVIDENCE

It would serve no purpose to review in detail the evidence against each appellant. We are satisfied that there was sufficient evidence to convict each appellant on each of the sixty-four counts on which guilty verdicts were returned. Only two arguments relating to the sufficiency of the evidence require extended discussion.

A. *As to Extortion*

Appellants contend that the only reasonable inference from the evidence was that bribery, and not extortion, was being committed. Therefore, they argue, there was a failure of proof as to the charges in the indictment.

"Extortion" is defined by the Hobbs Act as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. The "fear" may be fear of economic loss as well as of physical harm. *United States v. Sweeney*, 262 F.2d 272 (3rd Cir. 1959); *United States v. Stirone*, 262 F.2d 571 (3rd Cir.), *rev'd. on other grounds*, 361 U.S. 212 (1960). The Hobbs Act definitions of robbery and extortion are taken from New York law. *United States v. Nedley*, 255 F.2d 350 (3rd Cir. 1958). The definition of extortion at the time of the Hobbs Act's enactment was found in former New York Penal Law §850. In interpreting §850, the New York courts distinguished extortion from bribery. Thus, in *Hornstein v. Paramount Pictures*, 37 N.Y.S. 2*d* 404 (1942), the court pointed out that while bribery was a voluntary payment made in order to exert undue influence upon the performance of an official duty, extortion involves payment in return for something *to which the payor is already legally entitled*. In other words, while the essence of bribery is voluntariness, the essence of extortion is duress. *People v. Diognardi*, 8 N.Y. 2d 260, 168 N.E.2d 683 (1960).

The appellants argue that, in order for extortion to

have been made out here, the Government would have had to prove that the payments were induced by threatened interference with *then-existing* contract rights, e.g., threats to withhold payment for work already completed pursuant to a valid contract. Here, they assert, the alleged victims knew well in advance of their entering into municipal contracts that 10% was expected of those doing business with the city and agreed before the signing to pay their share. Thus, appellants conclude, the transactions constituted bribery, since the so-called victims were paying to acquire *future* contract rights rather than to protect contract rights which were already theirs.

Even assuming the accuracy of the factual portion of appellants' argument,[28] the legal propositions set forth cannot be accepted. First, while the contractors' advance knowledge that a kickback would be required might give rise to a jury question as to whether the transactions were briberous or extortionate, we cannot agree that advance knowledge alone conclusively establishes bribery. It is entirely conceivable, and a jury would certainly be entitled to infer, that in a widespread and highly effective extortion conspiracy, potential victims would be aware of the illicit requirements placed upon contractors and would succumb in advance of the contracting to the pressure which they knew would be forthcoming.

The second, and related, problem with appellants' argument is in its implicit assumption that *contractual property* rights are the only rights with which there could have been interference. In fact, contractual rights comprise only a part of the "package" of rights which can form the basis of an extortion. Contractors, engineers, and suppliers, for example, have a right to expect that, when they incur time and expense to bid on public projects, they will be awarded contracts when their bids are lowest, and that

28. We note, for example, that the Killam firm did *not* know of the "arrangement" when they first became involved in the Southside Project. Indeed, they withdrew as soon as they became aware of it.

they will subsequently enjoy the full financial benefits of their efficiency and industry. The City of Newark had systematically destroyed this right. As Boiardo told Rigo, "*everybody* in Newark pays 10% *or they don't work* in Newark and they don't get paid in Newark." (emphasis supplied) As a result, low bidders such as plumbing contractor Braun had their bids thrown out when they refused to participate in the kickback scheme. Ralph Cestone, who finally managed to have his low bid on the Southerly Extension accepted, was forced to pay kickbacks to keep from being financially harassed as the work progressed. Rigo testified that he paid, not to gain undue influence, but to protect his financial future in the face of threats from Boiardo. From this and other evidence, the jury was entitled to conclude both that the conspiracy was an extortionate one and that the sixty-three payments which formed the basis for the substantive counts were made by Rigo in response to extortionate demands. Therefore no failure of proof existed as to the extortionate nature of the crimes charged.

B. *As to Vicaro's Knowledge*

Vicaro argues that the evidence failed to establish, even circumstantially, that he had knowledge that the payments being made were the products of coercion, duress, or fear of economic injury. Therefore, he continues, the evidence established only that he knew that "something illegal" was taking place—perhaps bribery, perhaps extortion, perhaps something else. On such scant knowledge, he contends, a defendant may not be convicted of knowing participation in either a conspiracy to commit, or the substantive crime of, extortion.

We need not rule upon the Government's somewhat troublesome argument that Vicaro may not hide behind his "self-induced" ignorance, since we have concluded that a reasonable fact finder could have found that Vicaro was in fact *not* ignorant of the extortionate nature of the conspiracy.

Appendix A

The evidence as to Vicaro establishes that he was much more than a "mere delivery boy," as he characterizes himself. There is an abundance of evidence to connect him with the conspirators and the conspiracy. While, of course, a defendant may not be guilty "by reason of mere association," *Nassif v. United States*, 370 F.2d 147, 153 (8th Cir. 1966), the evidence as to Vicaro establishes a major vital role by him in the conspiracy, not a "mere association" with the co-conspirators. Not only had he been a close associate of Boiardo for many years, but it was Vicaro who had the crucial assignment and the highly sensitive responsibility of collecting enormous sums from Rigo. Vicaro concedes that Boiardo introduced him to Rigo and informed Rigo that thereafter Vicaro would pick up Rigo's payments. For over three years Vicaro alone made numerous collections of cash payments at odd times and under unusual circumstances. It was Vicaro who personally pressured Rigo with a series of "inquiries" as to when payments would be available. It was Vicaro who obviously carried with him the trust and confidence of the other coconspirators. When the Essex County Grand Jury investigation threatened to expose the conspiracy, it was Vicaro who warned Rigo to keep his mouth shut.

In view of the totality of these circumstances, there was sufficient evidence from which the jury could reasonably infer that Vicaro knew of the extortionate nature of the conspiracy. Since secrecy and concealment are essential features of a successful conspiracy, "the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details. . . ." [29] We therefore hold that the evidence as to Vicaro was sufficient to support the verdict on all counts.

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29. *Blumenthal v. U.S.*, 332 U.S. 539, 557 (1947).

Appendix A

VII.

CHARGE TO THE JURY

A. *On Interstate Commerce*

The appellants attack the court's charge on the interstate commerce element of the conspiracy and extortion in two respects. First, as to the conspiracy count, they assert that the court allowed the jury to find the requisite effect on interstate commerce on the basis of theories not alleged in the indictment. Second, as to all counts, they assert that the court charged on theories of interstate commerce not contemplated by the Hobbs Act.

1. *The Charge on the Conspiracy Count.*

The conspiracy count reads, in part, as follows:

> 1. That between January 1, 1965 and continuously thereafter until the very date of this indictment the City of Newark awarded contracts for municipal construction, all of which construction was and is dependent upon interstate commerce for materials, equipment, supplies and labor for completion.
> 2. That . . . [during the same period, the defendants conspired] to obstruct, delay, and affect interstate commerce . . . and the movement of materials, equipment, supplies and labor in such commerce by extortion . . . ; that is to say, that the defendants did conspire to delay, to obstruct, to impede and to thwart construction undertaken on behalf of the City of Newark, the contractors performing such work and the timely and usual movement of supplies and materials needed to complete such projects . . . in order to extort monies from the contractors.

The court charged the jury that they could find the interstate element of the crime if they believed that any of the following facts had been established:

(a) that the Southside project was designed to service

firms and industries engaged in interstate commerce; or

(b) that the Verona Construction Company was, during the time in question, engaged in business in New Jersey and other states; or

(c) that the Southerly Extension was designed to provide water service to firms and industries engaged in interstate commerce; or

(d) that Interpace was engaged in business in New Jersey and other states; or

(e) that the Southerly Extension was dependent upon interstate commerce for materials and supplies for completion; or

(f) that Constrad was formed for the purpose of doing business both within and outside New Jersey, and did engage in business outside of that state; or

(g) that the Meadowlands project was designed to provide facilities for both light and heavy industry and to attract such industry by virtue of its location near rail lines and the Newark Airport; or

(h) that the purpose of the Dunkers Pond and Susquehanna Aqueduct projects was to furnish water to firms and businesses engaged in interstate commerce

and if they further believed that there was "a conspiracy which contemplated the extortion of monies from any of the firms . . . just mentioned, or from any firms working on these several municipal projects. . . ."

In appellants' view, the only theory charged in count I was that municipal construction "was and is dependent upon interstate commerce for materials, equipment, supplies, and labor for completion." Therefore, appellants contend, except for (c) supra, the court's charge was predicated on theories of interstate commerce not alleged in the indictment, and thus violated the rule in *Stirone v. United States*, 361 U.S. 212 (1960).[30] We do not agree.

30. Appellants did not raise this objection below. However, under Fed. R. Crim. P. 52(b), a *Stirone* error is plain error and may

In *Stirone* the trial court charged the jury that they could find the interstate commerce element if they believed either (1) that sand had been shipped in interstate commerce to the victim's plant, or (2) that the victim's "concrete was used for constructing a mill which would manufacture articles of steel to be shipped in interstate commerce. . . ." 361 U.S. at 214. The Supreme Court reversed, holding that in allowing the jury to consider the latter theory, the trial judge had effectively amended the indictment, and thereby "destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." [31] 361 U.S. at 217.

Such variance between indictment and charge does not exist in this case. Every theory of interstate commerce on which the court charged was fairly and adequately set out in count I.

Appellants ignore that part of count I which charges interference with "[1] construction undertaken on behalf of the City of Newark, [2] the contractors performing such work and [3] the timely and usual movement of supplies and materials needed to complete such projects. . . ." While count I makes explicit reference to interstate commerce only with respect to the last of these effects, it is clear from the indictment read as a whole[32] that, in fact, it charges that *all three* effects interfered with interstate commerce.

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therefore be raised for the first time on appeal. *United States v. Roach*, 321 F.2d 1 (3d Cir. 1963).

31. See *Ex parte Bain*, 121 U.S. 1 (1887).

32. The substantive counts (II-LXIV) all charge offenses allegedly committed "in furtherance of the plan and purpose to commit the offense charged in Count I. . . ." An effect of one of the substantive offenses would therefore also be an effect of the conspiracy itself. We may therefore look to the substantive counts for an indication of the effect on interstate commerce which the indictment charged as having resulted from the conspiracy to thwart the construction of projects, the contractors involved, *and* the movement of supplies.

Appendix A

(i) *Construction of projects*

Counts II through IX each recited (a) that the Southside project was designed to transmit sewage from the place of business of firms engaged in interstate commerce, and (b) that the Southerly Extension was designed to transport water to consumers in Newark, including firms engaged in interstate commerce. Counts X-LXIV each recited (a) that the Meadowlands project was designed to improve a portion of Newark for industrial growth, "including the relocation of firms and businesses engaged in interstate commerce," and (b) that Constrad was engaged in performing services for the City of Newark in connection with the City's water supply system, which provided water to persons and firms engaged in interstate commerce.

(ii) *The Contractors*

Counts II-LXIV each recited that Constrad was organized to perform services in various states and foreign countries and, for that purpose, employed agents in Virginia, Florida, and certain foreign countries.

(iii) *Movement of supplies and materials*

Every count, including count I, indicated that the projects enumerated therein were "dependent upon interstate commerce for materials, equipment, supplies and labor for completion."

These recitals clearly indicated that the grand jury charged an adverse effect upon interstate commerce to have resulted from the conspiracy as it interfered with all three of the above, and not just with the last, as appellants would have us hold. Since an examination of the court's charge reveals that each of the eight theories upon which it charged falls within one of these three categories of interference, we must reject the appellants' argument.[33]

33. The language of Count I is drawn in general terms. The Government was therefore not restricted to proving interference as to those projects and contractors enumerated in the substantive

2. *Scope of the Hobbs Act*

Appellants also challenge the court's charge on the grounds that it contains theories of interstate commerce not contemplated by the Hobbs Act. Specifically, appellants cite those portions of the charge which allowed the jury to find the interstate element of the offense if they believed either

(a) that Constrad was formed for the purpose of doing business both within and outside New Jersey, and did engage in business outside of that state;

(b) that Verona Construction Company was, during the time in question, engaged in business in New Jersey and other states; or

(c) that the Meadowlands project was designed to provide facilities for both light and heavy industry engaged in interstate commerce.

Appellants contend that Congress could not have intended to include within the statute extortions with interstate effects as attenuated as these.

The reach of the Hobbs Act is not as limited as appellants assert, however. It outlaws extortion which obstructs interstate commerce *"in any way or degree."* (Emphasis supplied) "That Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone v. United States*, supra, at 215. See also *United States v. Tropiano*, 418 F.2d 1069, 1076 (2nd Cir. 1969); *United States v. Amabile*, 395 F.2d 47, 49 (7th Cir. 1968).

---

counts. Those counts do not purport to be an exhaustive compilation of the acts done in furtherance of the conspiracy, and they could not serve to limit the Government's proof. "[W]hen only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that *under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened.*" *Stirone*, 321 U.S. at 218.

It is not necessary that the *purpose* of the extortion be to affect interstate commerce, *United States v. Varlack*, 255 F.2d 665 (2nd Cir. 1955), but only that one of the *natural effects* thereof be an obstruction of that commerce. *Nick v. United States*, 122 F.2d 660 (8th Cir.), cert. den. 314 U.S. 687, rehearing denied 314 U.S. 714, rehearing denied, 316 U.S. 710. More specifically, as to the effect upon Constrad and Verona:

> Where the resources of a business are depleted or diminished in any manner or degree by payments of money obtained by extortion the capacity to efficiently conduct such business is to the extent of the drain on its resources likely to be impaired. . . . It is merely required by the law where extortion is shown that it did in some way or degree obstruct, delay or affect commerce. . . . It is the *depletion of the resources of a business* by extortion which permits as a reasonable inference if the extortion is established that its operations are delayed, obstructed, effected.[34] (emphasis supplied)

Clearly the resources of both Constrad and Verona were depleted by the extortionate scheme and their ability to carry on their business in interstate commerce was thereby impaired. As to the Meadowlands project, we agree with Judge Sanborn's observation in *Hulahan v. United States*, 214 F.2d 441, 445 (8th Cir. 1954):

> The exaction of tribute from contractors engaged in *local* construction work . . . who are engaged in constructing *facilities to serve . . . [interstate] commerce*, is, in our opinion, proscribed by the [Hobbs Act].

We therefore hold that all theories of interstate commerce contained in the indictment and the court's charge fall within the terms of the Hobbs Act.

34. This language was held to be a proper charge. *United States v. Provenzano*, 334 F.2d 678, 693 (3rd Cir. 1964).

Appendix A

B. *Bribery or Extortion*

As noted *supra* (VI-A) appellants have argued that the evidence proved bribery, and not extortion. We have rejected that argument. Alternatively, they assert that the evidence at least presented a fact question as to whether the crime involved was extortion or bribery, and that the trial court should therefore have instructed the jury as to the distinction between the two crimes, which appellants contend to be mutually exclusive.

Even assuming *arguendo* that the appellants are correct as to the state of the evidence and as to the mutual exclusivity of the crimes [35] we have concluded that no error was committed, for the court delivered an adequate charge on the legal questions involved. As outlined in VI.A., supra, the essence of the crime of bribery is voluntariness, while the essence of extortion is duress. *People v. Dioguardi*, supra; *Hornstein v. Paramount*, supra. Although the court did not mention the word "bribery" in its charge, it adequately set forth the characteristics distinguishing bribery from extortion. There was no need to instruct in detail as to an offense for which the defendants were not on trial. *Bianchi v. United States*, 219 F.2d 182 (8th Cir. 1955). The court charged that the jury had to find that the defendants had "wrongfully used *actual fear* . . . in order to induce Constrad to pay them money. . . . [U]nless the payments here alleged were made under some form of *compulsion*, there is no crime under the Hobbs Act. *The mere voluntary payment of money, unaccompanied by any [fear] of economic loss, would not constitute extortion.*" This charge was entirely fair and adequately informed the jury of the issue before them.

The remaining contentions of the appellants are also without merit and require no extended discussion. Upon consideration of the record as a whole, we find that the

35. *Compare People v. Feld*, 28 N.Y.S.2d 796, 797 (1941) (bribery and extortion mutually exclusive), *with* N.Y. PENAL LAW §§135.70, 155.10, 180.30, 200.15 (McKinney's 1965) (which eliminate the mutual exclusivity of the two crimes).

trial was conducted fairly, impartially and with careful regard for the rights of the appellants.

Accordingly, the judgments of conviction will be affirmed.

A True Copy :

Teste :

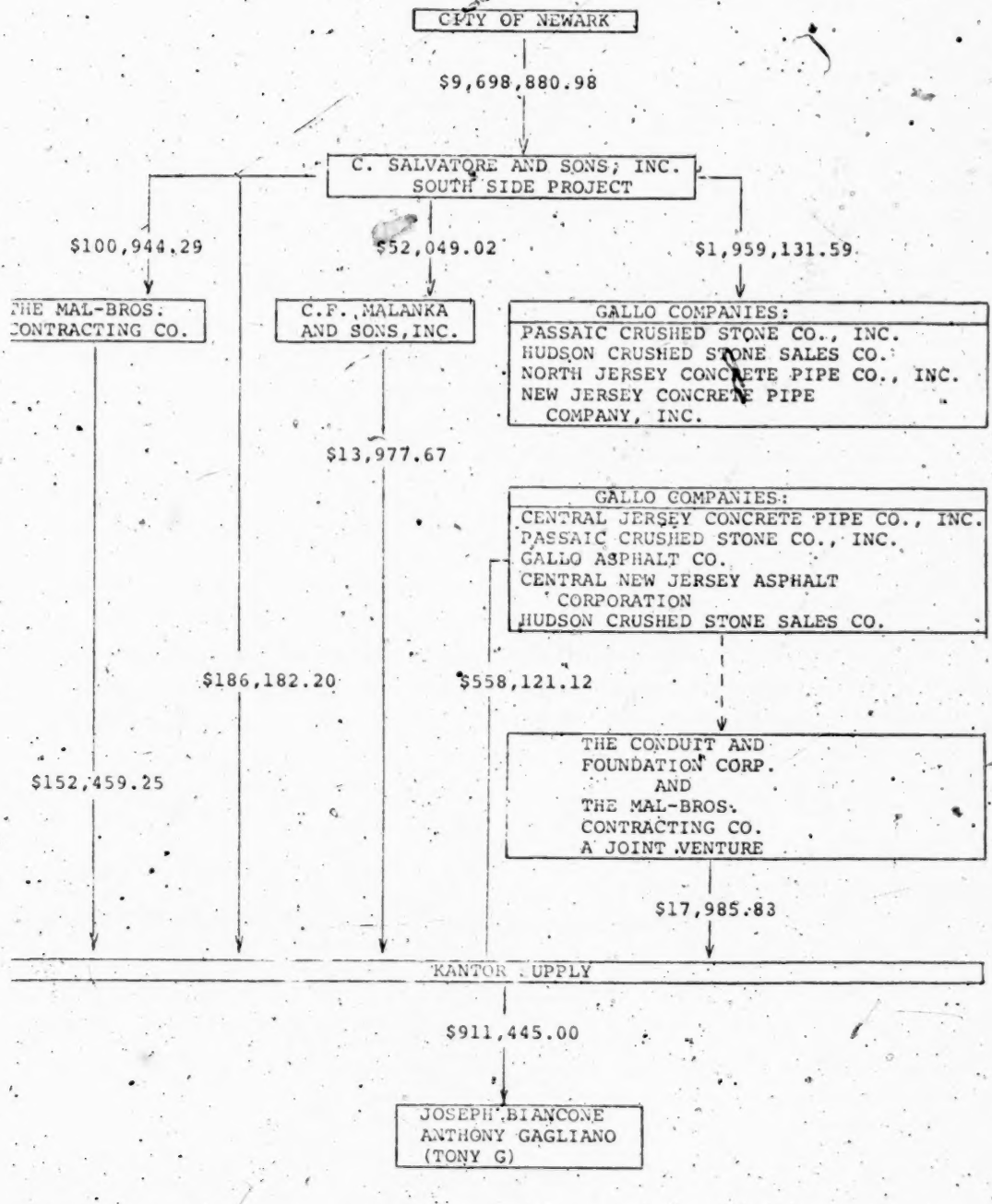
Clerk of the United States Court of Appeals for the Third Circuit

Appendix A

APPENDIX

Exhibit 1300

FLOW OF CASH



APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 19,295
No. 19,391
No. 19,392
No. 19,393

UNITED STATES OF AMERICA,

v.

HUGH J. ADDONIZIO, RUGGIERO A. BOIARDO, JR., ANTHONY LA MORTE, MARIO GALLO, JOSEPH BIANCONE, RALPH VICARO, NORMAN N. SCHIFF, PHILLIP GORDON, BENJAMIN KRUSCH, FRANK ADDONIZIO, LEE BERNSTEIN, JAMES CALLAGHAN, CALVIN D. WEST, ANTHONY GIULIANO, IRVINE I. TURNER,

RALPH VICARO, Appellant in No. 19,295
HUGH J. ADDONIZIO, Appellant in No. 19,391
ANTHONY P. LA MORTE, Appellant in No. 19,392
JOSEPH BIANCONE, Appellant in No. 19,393

(D. C. Criminal No. 548-69)

Appendix B

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present:

SEITZ, *Chief Judge* and FREEDMAN* and ROSEN,
Circuit Judges

These causes came on to be heard on the record from the United States District Court for the District of New Jersey and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, filed September 23, 1970, be, and the same are hereby affirmed.

ATTEST:

THOMAS P. QUINN
Clerk

September 16, 1971

*Judge Freedman participated in the consideration of these cases, but died before any disposition was made.

APPENDIX BX

Order of United States Court of Appeals Amending the Slip Opinion

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 19,295
No. 19,391
No. 19,392
No. 19,393

UNITED STATES OF AMERICA

v.

HUGH J. ADDONIZIO, RUGGIERO A. BOIARDO, JR., ANTHONY LA MORTE, MARIO GALLO, JOSEPH BIANCONE, RALPH VICARO, NORMAN N. SCHIFF, PHILLIP GORDON, BENJAMEN KRUSCH, FRANK ADDONIZIO, LEE BERNSTEIN, JAMES CALLAGHAN, CALVIN D. WEST, ANTHONY GIULIANO, IRVINE I. TURNER,

RALPH VICARO,
Appellant in No. 19295

HUGH J. ADDONIZIO,
Appellant in No. 19,391

ANTHONY P. LA MORTE,
Appellant in No. 19,392

JOSEPH BIANCONE,
Appellant in No. 19,393

Appendix BX

APPEAL FROM THE UNITED STATES COURT
FOR THE DISTRICT OF NEW JERSEY

ORDER

Present: SEITZ, *Chief Judge* and ROSENN, *Circuit Judge*

It is ORDERED that the slip opinion in these cases be and the same is hereby amended as follows:

Page 18, carry-over paragraph, delete lines 20 and 21.

Page 30, first full paragraph, line 7, delete the word "known" and substitute therefor the word "thought."

Page 33, second full paragraph, sentence commencing on line 4, should be corrected to read as follows:

> In the words of Biancone's counsel, "what the Government did was to put almost $1,000,000 into Biancone's hands without ever connecting that money to this case."

MAX ROSENN
Circuit Judge

Dated: September 24, 1971

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX C

Order of the United States Court of Appeals Denying Petitions for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 19,295

No. 19,391

No. 19,392

No. 19,393

UNITED STATES OF AMERICA,

v.

HUGH J. ADDONIZIO, RUGGIERO A. BOIARDO, JR., ANTHONY LA MORTE, MARIO GALJO, JOSEPH BIANCONE, RALPH VICARO, NORMAN N. SCHIFF, PHILLIP GORDON, BENJAMIN KRUSCH, FRANK ADDONIZIO, LEE BERNSTEIN, JAMES CALLAGHAN, CALVIN D. WEST, ANTHONY GIULIANO, IRVINE I. TURNER,

RALPH VICARO, Appellant in No. 19,295
HUGH J. ADDONIZIO, Appellant in No. 19,391
ANTHONY P. LA MORTE, Appellant in No. 19,392
JOSEPH BIANCONE, Appellant in No. 19,393

Appendix C

SUR PETITIONS FOR REHEARING

Present:

COLLINS J. SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS and ROSENN, *Circuit Judges*

The petitions for rehearing filed by Ralph Vicaro, Hugh J. Addonizio, Anthony P. La Morte, and Joseph Biancone in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petitions for rehearing are denied.

By the Court,
Max Rosenn
Judge

Dated: November 9, 1971

APPENDIX D

Title 18 U.S.C. Section 1951, the Hobbs Act

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits, or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory

or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

Amendment V to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI to the Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and

to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 34 ABA Standards Relating to Fair Trial and Free Press (Approved Draft March 1968)

Selecting the Jury

It is recommended that the following standards be adopted in each jurisdiction to govern the selection of a jury in those criminal cases in which questions of possible prejudice are raised.

(a) Method of examination.

Whenever there is believed to be a significant possibility that individual talesmen will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to his exposure shall take place outside the presence of other chosen and prospective jurors. An accurate record of this examination shall be kept, by court reporter or tape recording whenever possible. The questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how his exposure has affected his attitude towards the trial, not to convince him that he would be derelict in his duty if he could not cast aside any preconceptions he might have.

Appendix D

(b) Standard of acceptability.

Both the degree of exposure and the prospective juror's testimony as to his state of mind are relevant to the determination of acceptability. A prospective juror who states that he will be unable to overcome his preconceptions shall be subject to challenge for cause no matter how slight his exposure. If he has seen or heard and remembers information that will be developed in the course of trial, or that may be inadmisible but is not so prejudicial as to create a substantial risk that his judgment will be affected, his acceptability shall turn on whether his testimony as to impartiality is believed. If he admits to having formed an opinion, he shall be subject to challenge for cause unless the examination shows unequivocally that he can be impartial. A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to his testimony as to his state of mind.

(c) Source of the panel.

Whenever it is determined that potentially prejudicial news coverage of a given criminal matter has been intense and has been concentrated primarily in a given locality in a state (or federal district), the court shall have authority to draw jurors from other localities in that state (or district).

Nos. 71-744, 71-745, 71-754 and 71-756

In the Supreme Court of the United States

OCTOBER TERM, 1971

HUGH J. ADDONIZIO, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY P. LAMORTE, PETITIONER

v.

UNITED STATES OF AMERICA

RALPH VICARO, PETITIONER

v.

UNITED STATES OF AMERICA

JOSEPH BIANCONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-744

HUGH J. ADDONIZIO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 71-745

ANTHONY P. LAMORTE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 71-754

RALPH VICARO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 71-756

JOSEPH BIANCONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of New Jersey, petitioners and one Gordon[1] were convicted on sixty-three counts charging obstruction of commerce in violation of the Hobbs Act, 18 U.S.C. 1951, and one count of conspiring to commit that offense. Petitioners Addonizio and Biancone were sentenced to ten years' imprisonment and a $25,000 fine; petitioner LaMorte was sentenced to ten years' imprisonment and a $10,000 fine; and petitioner Vicaro was sentenced to 12 years' imprisonment and a $10,000 fine. The court of appeals affirmed in an exhaustive opinion (see Pet. in No. 71-744 (Addonizio) App. A 1-50).

The evidence is set forth in full in the opinion of the court of appeals. It shows that between 1964 and 1969 in Newark, New Jersey, contractors engaged in two large scale construction projects for the city of Newark were required to pay kickbacks of ten percent of the payments received from the city. This money went to the Mayor (petitioner Addonizio) and members of the city government (including petitioner LaMorte). Petitioners Biancone and Vicaro were directly involved in extracting cash from the contractors.

1. Each petitioner contends that the trial court erred in refusing a defense request to instruct upon the differences between bribery and extortion, the former not being included in the prohibition of Section 1951. The court refused this instruction but did instruct that the extortionate conduct required under

---

[1] Gordon has already filed a petition for a writ of certiorari, No. 71-626, this Term, to which we have filed a response.

18 U.S.C. 1951 did not encompass mere voluntary payments by the victim unaccompanied by any fear of economic loss (Pet. No. 71-744, App. A 49). This was sufficient under the evidence which showed that payments were made in response to extortionate demands (Pet. No. 71-744, App. A 41). At all events, the trial court's instruction adequately informed the jury that involuntariness of the payments was an essential element of the crime.

2. Petitioners LaMorte and Addonizio contend that the *voir dire* in the instant case was incorrectly conducted, because the prospective jurors were not questioned out of the presence of other jurors as to the possible prejudicial effect of pretrial publicity. This contention is dealt with fully by the court below (Pet. No. 71-744, App. A 25-29) and we rely upon its analysis and conclusion rejecting this claim. Petitioner Addonizio's additional arguments regarding the Confrontation Clause and his motion for severance are similarly discussed and properly rejected in the opinion below (see Pet. No. 71-744, App. A 35-37, 19-21). We note further that other recent cases support the position of the court below that, absent a showing of "real prejudice"—which is absent here—a defendant has no right to a severance in order that he may comment on the failure of his co-defendants to take the stand. *United States* v. *Caci*, 401 F. 2d 664, 671-672 (C.A. 2), and cases there cited, certiorari denied, 394 U.S. 917; *United States* v. *De La Cruz Bellinger*, 422 F. 2d 723, 726-727 (C.A. 9), certiorari denied, 398 U.S. 942; see also

United States v. *Rivera* (C.A. 2), petition for a writ of certiorari pending, No. 71-668, this Term.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1972.

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Supreme Court, U. S.
FILED
MAR 13 1972
E. ROBERT SEAVER, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-744

HUGH J. ADDONIZIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

BERNARD HELLRING,
Counsel for Petitioner,
1180 Raymond Boulevard,
Newark, New Jersey, 07102.

HELLRING, LINDEMAN & LANDAU,
Attorneys for Petitioner.

MICHAEL EDELSON,
On the Petition.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-744

HUGH J. ADDONIZIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Hugh J. Addonizio, respectfully prays that the Court reconsider its order denying his Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, in the above-entitled cause, entered by this Court on February 22, 1972, and grant the Petition.

As grounds for this Petition, Petitioner respectfully requests the Court's consideration of the following:

Petitioner filed his Petition for Writ of Certiorari on December 7, 1971. On December 23, 1971, the Circuit

Court of Appeals for the Fourth Circuit decided the case of *United States* v. *E. Graydon Shuford* which is printed in Appendix A to this Petition and is not yet reported.

Defendant Shuford and a co-defendant, Jordan, were convicted under Title 18 U.S.C., Sections 371 and 1001, for (1) the knowing submission of a false document with reference to a matter within the jurisdiction of the Department of Justice and (2) conspiracy. Shuford was an attorney specializing in personal injury cases, and Jordan was a legal investigator employed in Shuford's office. Shuford, along with one Long, the principal witness for the Government, established a physical therapy laboratory to provide treatment for those of Shuford's clients requiring it.

The case against Shuford arose out of an administrative claim for settlement filed by Shuford on behalf of one of his clients under the Federal Tort Claims Act. The claim included a bill for the client's physical therapy treatments. Forty-five dollars of that bill were charges for appointments made but not kept. Shortly after the laboratory had been established, Long had a discussion with Shuford concerning the procedure for billing clients for appointments they failed to keep. Shuford testified at the trial that he instructed Long to bill for such broken appointments with the further instruction, however, that these items should not appear in any later litigation or settlement negotiations. In his testimony, Long strongly suggested that it was Shuford's intention to use the bills to enhance his clients' recoveries.

Jordan, who was the only other possible witness as to Shuford's instructions to Long, did not take the witness stand at the trial.

Before the trial began, and at the conclusion of the Government's case, Shuford had moved for severance in order to be in a position to call Jordan as a witness. Jordan indicated he would not testify at the joint trial. He apparently made no affirmative statement as to his willingness to testify on Shuford's behalf if severance were, in fact, granted, but did not "dissent" when Shuford's attorney asserted that Jordan was "not averse" to so doing. (A-5).*

In reversing Shuford's conviction on the ground that denial by the trial court of Shuford's motions for severance from Jordan had deprived him of a fair trial, Judge Sobeloff of the Fourth Circuit, wrote:

> "In a situation where the elusive quality of credibility is of such importance, the jury should have the benefit of all relevant testimony likely to shed light on the situation. We think the denial of the severance, resulting in withholding this witness' testimony on such a crucial point, so tipped the scales against Shuford that he failed to receive a fair trial." (A-9, A-10)

The court distinguished the *Shuford* case from those cited by the Government holding a severance was not required, on the basis that in *Shuford* both defendants had indicated that Jordan would testify if a severance were granted, stating, however:

> "This is not to say that it is beyond question that Jordan's testimony would be forthcoming after severance. The movant is not put to such stringent proof. A reasonable probability appearing that the proffered testimony would, in fact, materialize, Shuford should not have been foreclosed from the

---

* "A" citations are to Appendix A of this Petition for Rehearing.

benefits of Jordan's pivotal testimony simply because that probability was not an absolute certainty." (A-11, A-12, citations and footnote omitted)

The factual setting and the indictment in the instant case are more complicated than in *Shuford*. Petitioner was named in a multi-count, multi-defendant indictment which charged conspiracy to extort and extortion from contractors and engineers doing business with the City of Newark over a five and one-half year period. The procedural disabilities to a defendant in such a trial as cataloged by Mr. Justice Jackson in *Krulewitch* v. *United States*, 336 U. S. 440, 445 (1949, concurring opinion) were repeated and amplified by Mr. Justice Douglas in his dissent to the order denying Addonizio's Petition for Writ of Certiorari with the observation that "[a]ll of these oppressive features were present to various degrees in this trial." —— U. S. —— (1972).

The fifteen defendants named in the indictment fell largely within two groups; public officials of the City of Newark, and reputed members of the Mafia (Boiardo, Biancone, and Vicaro).

Your Petitioner brought a pretrial motion for severance from those of his co-defendants who had been described by the press as members of organized crime and from Philip Gordon, a former councilman and corporation counsel of the City of Newark, who was known to have testified before the Grand Jury that he received illicit payments from the Government's principal witness, Paul Rigo. In arguing this motion, Addonizio made clear his willingness, and indeed his desire, to stand trial jointly with the public officials other than Gordon named in the indictment (6204a)[1]. He anticipated the problem,

[1] "a" citations are to the joint appendix filed by Appellants on appeal to the Third Circuit.

however, of presenting a full and adequate defense in a joint trial with those from whom he sought severance; arguing that such a joint trial would both prohibit him from calling upon these defendants for their testimony and would further prohibit him from making reference to the expected decision of these defendants not to testify (6187a). While the defendants Gordon, Boiardo, Biancone, and Vicaro did not represent to the Court that they would not testify in a joint trial or that they would testify on Addonizio's behalf should severance be granted and they be tried first; neither did they dispute these possibilities when Addonizio's counsel made his argument.

Petitioner's pretrial motion for severance was denied by the trial court, primarily on the basis that it was speculative and premature. *United States* v. *Addonizio*, 313 F. Supp. 486, 498 (D. N. J. 1970).

On the very first day of jury selection, the defendants Frank Addonizio, West, Bernstein, and Turner, all elected public officials during the time encompassed by the indictment, were severed. Addonizio promptly renewed his motion for the same relief (657a, 658a). He was now joined for trial with those co-defendants whom he could reasonably anticipate would not testify in a joint trial and severed from four co-defendants whom he could reasonably anticipate would take the stand in a joint trial; but who would not testify on his behalf now that they had been severed for later trial. His motion for severance renewed on these grounds prior to the Government opening was again denied (1094a, 1095a).

At the time the last Government witness had concluded his testimony, Petitioner remained on trial with the defendants Gordon, Boiardo, Biancone, Vicaro, and La-

Morte.[2] All other defendants had been severed. The evidence elicited by the Government had shown that contractors and engineers doing business with the City of Newark had been engaged in illegal activities and that such activities had been either aided or fostered by those defendants other than Gordon, who remained on trial with the Petitioner. In addition, Gordon's Grand Jury testimony that he had accepted money from Rigo had been admitted over Addonizio's objection, but without objection from Gordon (3033a-3043a). Direct evidence against Petitioner came from only one witness, Paul Rigo, whose credibility was very seriously challenged. The testimony, however, which tended most to incriminate Petitioner, as well as the other elected officials, came in the form of hearsay statements attributed to the defendants Boiardo, Biancone, and LaMorte. Those statements were of the highly unreliable nature of either solicitations for campaign contributions allegedly made on behalf of the Mayor or claims that funds demanded were, in part, destined for the elected officials of the City of Newark.

At the close of the Government case, Petitioner renewed his motions for severance (4087a, 4088a). They were again denied.

Addonizio testified as the first defense witness. He denied demanding or receiving any money and denied knowledge either of the acts or words attributed to his co-defendants.

All other defendants remaining on trial, as anticipated, elected not to testify, thereby foreclosing Petitioner from any opportunity to confront and cross-examine those who

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[2] LaMorte was the Director of Public Works for the City of Newark.

had, in effect, become the real witnesses against him. There was no opportunity to elicit from Gordon the meaning of his Grand Jury testimony and to demonstrate that the acceptance by him of money from Rigo was not in furtherance of a conspiracy as charged in the indictment. Nor was there opportunity to question the other defendants as to the truth of the statements attributed to them. Petitioner was unable even to point out this handicap to the jury in summation because of the trial court's ruling that such argument would violate the Fifth Amendment rights of his co-defendants (5333a).

The corroborating testimony of the other elected officials (with whom Addonizio should have been tried), who were now severed and awaiting later trial was likewise unabailable since they were unwilling to jeopardize their own defense to testify at the Petitioner's trial.

Petitioner again renewed his motion for severance at the close of the defense case on grounds previously advanced and on the additional ground of denial of the opportunity to comment on his co-defendants' failure to take the stand (5174a-5177a, 5184a, 5185a). His motion was again denied.

The Fourth Circuit in *Shuford* wrote:

> "Primarily for reasons of economy of time in judicial administration, the general rule has evolved that persons jointly indicted should be tried together. *Hall* v. *United States,* 168 F. 2d 161 (D. C. Cir. 1948); *Dykes* v. *United States,* 313 F. 2d 580 (D. C. Cir. 1962). This rule has particular strength where, as here, one crime may be proved against two or more defendants on a single set of facts or from the same evidence. *United States* v. *Lebron,* 222 F. 2d 531 (2d Cir. 1955), *cert. denied,*

350 U. S. 876 (1955). Notwithstanding the need for efficiency in judicial administration, a joint trial is inappropriate if it sacrifices a defendant's right to a fundamentally fair trial. *Baker* v. *United States*, 329 F. 2d 786 (10th Cir. 1964), *cert dismissed*, 379 U. S. 835 (1964); *Barton* v. *United States*, 263 F. 2d 894 (5th Cir. 1959)." (A-5, A-6)

In upholding the trial court's denial of Addonizio's motions for severance, the Third Circuit stated "Nor were there any other prejudicial circumstances which would have justified the disintegration of a conspiracy trial of this magnitude." (p. 21a of Appendix to original Petition for Certiorari) We respectfully submit that the joinder of defendants for trial in this case constituted a clear violation of Petitioner's right to a fundamentally fair trial, making it impossible for him to properly present his defense. The severance of the other elected officials deprived him of their corroborating testimony which probably would have been forthcoming in a joint trial; while the joinder with the "organized crime" defendants and Philip Gordon, all of whom did not take the stand, deprived him of the opportunity to cross-examine them as to the hearsay statements attributed to them by virtually every Government witness who testified. Such "circumstances" alone were, we submit, sufficiently prejudicial to justify "the disintegration of a conspiracy trial of this magnitude", at least to the extent of severing Addonizio for later trial with the other elected officials.

The plain fact, however, is that this conspiracy trial had already "disintegrated" with the severance of the elected official defendants Frank Addonizio, West, Bernstein, and Turner. A fifth defendant, Benjamin Krusch, had by that time also been severed. A second trial was

already required. The severance of Addonizio to wait for trial with these severed public officials would have done no violence to the requirement of judicial economy, but would have helped to allow Petitioner his constitutional right to a fair trial.

It is most respectfully submitted that the issues presented by this case are of such importance as to require full hearing by this Court. The procedural advantages to the prosecution in a mass conspiracy trial and the concomitant dangers to the right of the individual defendant to a fair trial—to the opportunity to present a full and proper defense—are each enormous. The potential for abuse is even more apparent where public figures, so peculiarly vulnerable to the type of charges here alleged, are involved. An increased need for guidance from this Court is felt as we read almost daily of new conspiracy indictments naming as defendants both elected officials and political activists. The present climate of public opinion with the ready willingness to assume corruption in high places requires additional vigilance to assure a fair trial for those so accused.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Petition for Rehearing be granted, and that, upon further consideration, writ of certiorari issue to the U. S. Court of Appeals for the Third Circuit.

Respectfully submitted,

BERNARD HELLRING,
Counsel for Petitioner.

HELLRING, LINDEMAN & LANDAU,
Attorneys for Petitioner.

MICHAEL EDELSON,
On the Petition.

Certificate of Counsel

I, BERNARD HELLRING, counsel for the above-named Petitioner, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the guidelines specified in Rule 58, Subdivision 2 of the Rules of this Court.

BERNARD HELLRING,
Counsel for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-1424

UNITED STATES OF AMERICA,

Appellee,

versus

E. GRAYDON SHUFORD,

Appellant.

No. 71-1425

UNITED STATES OF AMERICA,

Appellee,

versus

HERMAN S. JORDAN, JR.,

Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT CHARLESTON.
J. ROBERT MARTIN, JR., DISTRICT JUDGE

Appendix A

(Argued August 23, 1971 Decided December 23, 1971.)

Before HAYNSWORTH, Chief Judge, SOBELOFF, Senior Circuit Judge, and WINTER, Circuit Judge.

F. Lee Bailey (N. Welch Morrisette, Jr., Gerald Alch, Ralph C. Robinson, Jr., on brief), for Appellant in No. 71-1424; C. D. Hopkins, Jr. (Malcolm M. Crosland, on brief), for Appellant in No. 71-1425; Marvin L. Smith and Robert G. Clawson, Jr., Assistant United States Attorneys (John K. Grisso, United States Attorney, on brief), for Appellees in Nos. 71-1424 and 71-1425.

SOBELOFF, Senior Circuit Judge:

This case raises one of the problems sometimes encountered when two criminal defendants, each surrounded by a multitude of procedural protections, are tried jointly and the effectuation of one defendant's rights necessarily works an infringement of the rights of the other.

E. Graydon Shuford and Herman S. Jordan, Jr. appeal from their convictions under 18 U.S.C. §§ 371 and 1001, for (1) the knowing submission of a false document with reference to a matter within the jurisdiction of the Department of Justice and (2) conspiracy. Each defendant was sentenced to 18 months imprisonment on each count, sentences to run concurrently.

Appendix A

I

The events leading to these convictions began in the fall of 1969 when Shuford, an attorney specializing in personal injury cases, helped establish the West Ashley Physical Therapy Laboratory ("Laboratory") in conjunction with one Gene H. Long. The latter, named in the indictment as a co-conspirator but never brought to trial, was an experienced physical therapist who ran the Laboratory and was responsible for billing patients and general record keeping. The Laboratory was formed in order to provide physical therapy for those of Shuford's clients who required such treatment.

Two weeks after the Laboratory opened, Long approached Shuford and told him that some of the physical therapy patients were not keeping their appointments. Shuford instructed Long to bill these patients for their unkept appointments anyway. Several days later, Long had occasion to speak with Jordan, a legal investigator employed in Shuford's office, about the unkept appointments. Jordan, when informed by Long of Shuford's earlier instructions, told Long to do as he had previously been directed.

Meanwhile, on November 17, 1969, Mack C. Wheat was involved in an automobile accident with an agent of the Federal Bureau of Investigation. Wheat retained Shuford as his attorney and was ultimately referred to the Laboratory for Physical therapy. In January of 1970, Shuford filed on behalf of Wheat an administrative claim for settlement under the Federal Tort Claims Act. Appended to the claim was a bill for Wheat's physical therapy treatments at the Laboratory—a bill which included $45 in charges for three unkept appointments. No indication appeared on the face of the bill that these appointments were

not kept. However, a hospital bill, also submitted with the claim, indicated that Wheat was in the hospital on the dates of the three appointments in question. The claim was therefore rejected and a criminal investigation was begun, resulting in the instant prosecution.

Before the trial began and again after the prosecution submitted its evidence, Shuford moved that Jordan's case be severed from his own so that he might have the benefit of Jordan's testimony.[1] Jordan likewise moved to have his case severed and joined in Shuford's motion. Although Shuford testified in his own behalf, Jordan ultimately decided not to take the stand. According to Jordan's statement to the court in support of Shuford's second motion for severance, two considerations prompted his decision not to testify: First, he wanted to avoid cross-examination that would bring to light certain prior convictions of his, and second, he planned to stand on the insufficiency of the government's evidence and feared that if he took the stand in his own trial, he might strengthen the case against him by placing his credibility and demeanor before the jury. Shuford's attorney, arguing the motion for

[1] When Shuford's attorney first moved for severance, he stated to the trial judge, "I know what [Jordan's] testimony would be, and it directly contradicts the indictment."

At the conclusion of the Government's case, in arguing Shuford's second motion for severance, made with leave of court, Shuford's attorney was even more explicit. He asserted, "Jordan would testify if he could be produced that there was no instruction to his knowledge as the witness Long has testified to falsify or build up any therapy lab reports"; that he had no knowledge that the Mack C. Wheat bill was false or erroneous in any respect until the criminal investigation began; and that he conspired with no one to create any false or fraudulent reports as to anyone involved.

severance, further asserted, apparently without dissent by Jordan, that Jordan was not averse to testifying in Shuford's behalf at a separate trial, since his own defense would not thereby be jeopardized.

Before ruling on the motions for severance, the trial judge, in an endeavor to meet Jordan's objections to taking the stand in the joint trial, offered to forbid the Government from raising Jordan's prior criminal record on cross-examination. Jordan, however, still remained unwilling to testify, preferring to challenge the sufficiency of the Government's case without exposing himself as a witness in his own behalf. The trial judge denied the severance motions.

Shuford argues that only if severance were granted and Jordan were not before the court as a defendant could he have called Jordan to testify in his behalf. Since Jordan was the only witness Shuford could present to controvert the testimony of Long, the Government's chief witness, Shuford contends that denial of the severance so prejudiced his defense as to destroy the fairness of his trial.

II

Primarily for reasons of economy of time in judicial administration, the general rule has evolved that persons jointly indicted should be tried together. *Hall* v. *United States*, 168 F. 2d 161 (D. C. Cir. 1948); *Dykes* v. *United States*, 313 F. 2d 580 (D. C. Cir. 1962). This rule has particular strength where, as here, one crime may be proved against two or more defendants on a single set of facts or from the same evidence. *United States* v. *Lebron*, 222 F. 2d 531 (2d Cir. 1955), *cert. denied*, 350 U. S. 876 (1955). Notwithstanding the need for efficiency in judicial adminis-

tration, a joint trial is inappropriate if it sacrifices a defendant's right to a fundamentally fair trial. *Baker* v. *United States*, 329 F. 2d 786 (10th Cir. 1964), *cert. dismissed*, 379 U. S. 853 (1964); *Barton* v. *United States*, 263 F. 2d 894 (5th Cir. 1959).

For these reasons, although Rule 14 of the Federal Rules of Criminal Procedure places the grant or denial of a severance in the sound discretion of the trial judge, *Opper* v. *United States*, 348 U. S. 84 (1954); *United States* v. *Frazier*, 394 F. 2d 258 (4th Cir. 1968), if a "substantial degree of prejudice" springs from a joint trial, a severance is mandated. *United States* v. *Morgan*, 394 F. 2d 973 (6th Cir. 1968); *United States* v. *Burgio*, 279 F. Supp. 843 (S. D. N. Y. 1968). Not surprisingly, the facts peculiar to each case will determine whether sufficient prejudice exists to make the denial of a severance reversible error. *Schaffer* v. *United States*, 221 F. 2d 17, 19 (5th Cir. 1955).

The reported decisions support the proposition that a severance is obligatory where one defendant's case rests heavily on the exculpatory testimony of his co-defendant, willing to give such testimony but for the fear that by taking the stand in the joint trial he would jeopardize his own defense.

The leading exposition of this proposition is *United States* v. *Echeles*, 352 F. 2d 892 (7th Cir. 1965). Echeles, a member of the Illinois bar, was charged, together with two others, with suborning perjury, impeding the administration of justice and conspiracy. During the joint trial, it appeared that admissions previously made by Echeles' co-defendants would be introduced into evidence against them. Echeles contended that these admissions reflected

unfairly on the question of his own guilt. Moreover, he asserted, other statements previously made by his co-defendants—absolving him from any part in the wrongdoing—would be admissible only if the co-defendants repeated them on the witness stand. Echeles moved for a severance on the ground that, since the Fifth Amendment prohibited him from calling his co-defendants to testify in his behalf, his only possible protection was through the grant of a severance. The trial court denied the motion. The Seventh Circuit reversed, holding on these facts that denial of the severance so prejudiced Echeles' defense that a new trial was required.[2]

The denial of a severance prejudiced Echeles by preventing him from effectively countering one important element of the prosecution's case. Similarly, in the instant case, rejection of the severance motion prejudicially denied Shuford the opportunity to present testimony highly relevant in the resolution of the issue of guilt or innocence.

III

At the trial, Jordan's testimony was sought by Shuford in regard to a crucial fact on which the Government and Shuford were in sharp disagreement, namely the precise nature of Shuford's instructions to Long regarding billing practices. Shuford testified that he advised Long that the

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[2] Other courts likewise have recognized that a severance is due where the moving defendant needs the evidence of a co-defendant; this need is unlikely to be met in a joint trial; and "there is a substantially greater likelihood" that the evidence would be forthcoming if severance were granted. United States v. Gleason, 259 F. Supp. 282 (S. D. N. Y. 1966). *See also,* United States v. Addonizio, 313 F. Supp. 486 (D. C. N. J. 1970).

Laboratory could bill patients for missed appointments, but he added the admonition that these items should be handled in a manner as not to appear in later litigation or settlement negotiations.[3] Long, in contrast, testified to a version that was significantly different. He strongly suggested that Shuford was intending to use the misleading bills to enhance his clients' recoveries.[4]

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[3] Shuford testified in part that:

> I told [Long] at that time that I thought it would be legally proper to bill [patients] for appointments made but not kept. However, to indicate this on any bills that he sent to me.
>
> * * *
>
> Of course, in presenting a claim, the only certain items that are legally recoverable, for instance, a bill for broken appointment would not be an item for damages that would be recoverable.
>
> * * *
>
> I told [Long] that I would not protect the payment of the bill for his broken appointments, that he would have to collect that from the patient himself.

[4] Long testified in part that:

> [Shuford] told me that if the patients kept their appointments, or if they did not, that they were to be marked as if they had * * *. He said that if his clients did not keep their appointments and I did not mark them down for treatment anyway, when he went to court or to an insurance company with the claim, that the insurance company or the court or whatever would say well, if you had really been hurt, injured, or such, then you would have kept your appointments. This was his reason that he gave me * * *. Mr. Shuford told me that the larger the medical expense as a general rule the larger the settlement.

Thus the situation presented to the jury was that if they credited Long, then they could find that Shuford intended to falsify the therapy bill submitted to the Government. On the other hand, if they believed Shuford, they could see him as the innocent victim of Long's failure to follow instructions. Plainly, the guilt or innocence of Shuford hinged, in large measure, on the outcome of this credibility dispute.

No other witness testified regarding Shuford's instructions to Long. Indeed the only other potential witness with direct knowledge of this phase of the case was Jordan who, in the absence of a severance, declined to take the stand. And the Fifth Amendment gave Jordan the right not even to be called to the stand so long as he was a defendant. *United States* v. *Keenan*, 267 F. 2d 118, 126 (7th Cir. 1959), *cert. denied*, 361 U. S. 836 (1959); *Paretto* v. *United States*, 196 F. 2d 392, 394 (5th Cir. 1952). This right extends so far as to forbid not only the Government, but even Shuford from calling Jordan to the stand. *DeLuna* v. *United States*, 308 F. 2d 140 (5th Cir. 1952); *United States* v. *Housing Foundation*, 176 F. 2d 665, 666 (3d Cir. 1949). However, if Jordan's case were severed, while he would retain the privilege against self-incrimination, as a witness, he would no longer have the right not to be *called* to the stand. *Landy* v. *United States*, 283 F. 2d 303 (5th Cir. 1960). Thus, absent Jordan's willingness to waive his Fifth Amendment rights while joined as a defendant with Shuford, severance was the only way of affording Shuford any possibility of persuading Jordan to testify.

In a situation where the elusive quality of credibility is of such importance, the jury should have the benefit of all relevant testimony likely to shed light on the situa-

tion. We think that the denial of the severance, resulting in withholding this witness' testimony on such a critical point, so tipped the scales against Shuford that he failed to receive a fair trial. A verdict based so heavily on less than the full available testimony, where the missing testimony could, with relative ease, have been procured, should not stand.[5]

IV

In its brief on appeal, the Government argues that, even if severance were granted, there is no assurance that Jordan "would be any more willing to waive his Fifth Amendment privilege in a separate trial as opposed to a joint trial." In support of this contention, we are cited to a number of cases which have, out of a similar scepticism, upheld the denial of a severance in circumstances arguably analogous to those present here: *e.g., United States v. Frazier*, 394 F. 2d 258 (4th Cir. 1968); *United States v. Kilgore*, 403 F. 2d 627 (4th Cir. 1968), *cert. denied*, 394 U. S. 932 (1969); *United States v. Kahn*, 381 F. 2d 824 (7th Cir. 1967), *cert. denied*, 389 U. S. 1015 (1967); *Kolod v. United States*, 371 F. 2d 983 (10th Cir. 1967).

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[5] It is significant that, in this case, severance would only have required two relatively uncomplicated trials in place of one—not an undue burden from the viewpoint of judicial administration. Where severance would necessitate a great number of otherwise unnecessary trials or the duplication of an unusually complex trial, a district court, in the exercise of its discretion, could well consider these factors as possible counterweights to the benefits accruing to the moving defendant from severance in the particular circumstances. *See* United States v. Turner, 274 F. Supp. 412 (D. C. Tenn. 1967); United States v. Crisona, 271 F. Supp. 150 (S. D. N. Y. 1967) (Mansfield, J.). The paramount question, however, is always whether refusal of the severance impairs the fairness of the trial.

However, none of the cases relied upon by the Government is apposite here. In those cases, the courts simply refused to accept an appellant's unsupported assertion that, if severance had been ordered, a co-defendant would thereafter have waived his Fifth Amendment privileges and testified as promised.[6] Where, for the first time on appeal, a party raises such an argument without support in the record, an appellate court rightfully refuses to indulge in pure supposition as to what the behavior of a co-defendant would have been, if the requested severance had been granted.

In the present instance, however, we are not called upon to engage in an exercise of clairvoyance. Both Shuford and Jordan indicated quite clearly to the trial judge not only that Jordan would testify if granted a severance, but also the precise content of the expected testimony and its importance.[7] This is not to say that it is beyond question that Jordan's testimony would be forthcoming after severance. The movant is not put to such stringent proof.

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[6] *See, e.g.*, United States v. Kilgore, 403 F. 2d 627, 628 (4th Cir. 1968), *cert. denied*, 394 U. S. 932 (1969):

> It does not appear, however, that an adequate record was made below to sustain such a contention. It was nowhere demonstrated that the co-defendant was willing, at a separate trial, to corroborate Morris' story * * *. We cannot simply assume that the corroborative testimony would have been forthcoming * * *.

To the same effect, *see*, United States v. Kahn, 366 F. 2d 259, 263-64 (2d Cir. 1966), *cert. denied*, 385 U. S. 948 (1966); United States v. Kahn, 381 F. 2d 824 (7th Cir. 1967), *cert. denied*, 389 U. S. 1015 (1967).

[7] *See* note 1, *supra*; part III, *supra*.

A reasonable probability appearing that the proffered testimony would, in fact, materialize, Shuford should not have been foreclosed from the benefits of Jordan's pivotal testimony simply because that probability was not an absolute certainty. *United States* v. *Echeles*, 352 F. 2d 892 (7th Cir. 1965); *United States* v. *Gleason*, 259 F. Supp. 282 (S. D. N. Y. 1966).[8]

We reach this conclusion, aware of the vital importance of Jordan's testimony to Shuford's defense, and in light of the substantial expectation that Jordan, if severance were granted, would indeed testify as indicated. We emphasize that our approach in this case does not mandate a severance in every situation where one defendant desires the testimony of another. We hold only, on the specific facts of this case, that Jordan's testimony took on unusual

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[8] In his dissent, Judge Haynsworth would uphold the denial of the severance because in his view the record does not reflect a sufficient likelihood that Jordan would testify at Shuford's separate trial and that, fact, it would be against Jordan's interest so to testify.

It is true that fine judgments as to Jordan's state of mind in the event of severance are not easily made. While it would overstate the matter to say that beyond any possibility of doubt Jordan would testify as promised, it is as certain as may reasonably be expected. We differ with our dissenting brother in the interpretation of the record in this regard. Jordan's failure to repeat in detail the arguments and conclusions of Shuford's attorney, recited in the presence of Jordan and his attorney, concerning Jordan's testimony is, to our minds, highly indicative of their agreement with Shuford's analysis and that if severance were granted Jordan would in fact testify. Significant is the fact that the trial court was effectively apprised by both counsel of the problem presented. Severance was the obviously available solution.

importance for Shuford's defense; that this testimony could become available only by severance; and that in these circumstances it was reversible error to deny Shuford's motion.[9]

V

We perceive no error in the court's overruling Jordan's motion for severance. Unlike Shuford, Jordan was not confronted with an inability to produce testimony vital to his defense. Jordan, in addition, complained that he was prejudiced by the jury argument of Shuford's attorney who said, "Mr. Shuford answered questions in a direct, forthright manner without evasion." Jordan maintains that this was an oblique reference to his failure to take the stand. We find no substance in this argument. It is true that there are decisions holding that a defendant may be entitled to a new trial because comment prejudicial to him was made in the jury's presence by a co-defendant's attorney. But these are cases in which the co-defendants were attempting to cast guilt upon each other. *See DeLuna v. United States*, 308 F. 2d 140 (5th Cir. 1962). This is not the case here; in the existing situation counsel's remark lacked the sinister implication attributed to it by Jordan.

The other assignments of error made in Jordan's appeal are equally unsupportable. However, the peculiar circum-

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[9] Shuford also raises a number of alleged errors in the trial court's evidentiary rulings and challenges the sufficiency of the evidence to convict him. In view of our present holding reversing Shuford's conviction, which will require a retrial, it is unnecessary to decide these issues at the present time. They may not arise in the new trial, or if they do, the context may be different.

stances of the case prevent us from affirming Jordan's conviction at this time. As the indictment and the evidence at trial show, Jordan's involvement with the substantive crime charged was that of an aider and abettor of Shuford as principal. It is an accepted rule that where the only potential principal has been acquitted, no crime has been established and the conviction of an aider and abettor cannot be sustained.[10] *Shuttlesworth* v. *City of Birmingham*, 373 U. S. 262 (1963). This rule, undeviatingly followed for generations, would be offended if, on retrial, Shuford, the principal, should be acquitted and the conviction were allowed to stand as to Jordan, the aider and abettor. We therefore vacate Jordan's conviction on the substantive count, under 18 U.S.C. §§ 2 and 1001, contingent upon Shuford's conviction, at his retrial, of the substantive offense charged.

The remaining count on which Jordan stands convicted charges a conspiracy between Jordan, Shuford and other unindicted individuals. It is well recognized that a conviction of one conspirator cannot stand beside the acquittal of his *only* co-conspirator; *Romontio* v. *United States*, 400 F. 2d 618 (10th Cir. 1968); *Lubin* v. *United States*, 313 F. 2d 419 (9th Cir. 1963). Where, however, the indictment names additional, untried conspirators, conviction will be affirmed notwithstanding the acquittal of the co-defendant. *Cross* v. *United States*, 392 F. 2d 360 (8th Cir. 1968); *United States* v. *Gordon*, 242 F. 2d 122 (3rd Cir. 1957).

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[10] Lest we be misunderstood, we emphasize that an aider and abettor may be tried before the principal and where the commission of a crime is proved, an aider and abettor may be tried even if the principal is unknown. Fieldstein v. United States, 429 F. 2d 1092 (9 Cir.), *cert. denied*, 400 U. S. 920 (1970).

Nevertheless, this rule cannot be invoked to affirm Jordan's conspiracy conviction. The trial court charged the jury that in order to convict on the conspiracy count it would be sufficient if they found an agreement between "the defendants and named [but unindicted] co-conspirators, or at least two of the number." It is impossible to know whether the jury found that Jordan conspired with Shuford alone or with others and it would be improper to speculate in this regard. We therefore vacate Jordan's conviction as to the conspiracy count also and grant him a new trial on that charge.

Reversed and Remanded as to 71-1424; Vacated and Remanded With Instructions as to 71-1425.

HAYNSWORTH, Chief Judge, dissenting:

There is no disagreement between my brothers and me over the general principles of law which should govern our decision. We all agree that a motion to sever is addressed to the sound discretion of the District Judge, though its denial is reviewable by the Court of Appeals, if denial deprives a trial of essential fairness. We do differ in our appraisal of the practical situation which confronted the District Judge. In my view of the record and the practical problem presented, the District Court's denial of Shuford's motion for a severance was in no sense an abuse of the sound discretion lodged in it. I must conclude, therefore, that we overreach our authority in granting a new trial and in directing a severance.

Before the commencement of the trial, Shuford made a motion for a severance. Through counsel, he stated that he

intended to take the witness stand, that his testimony would be favorable to Jordan, as well as to himself, that he had expected Jordan to testify in his own defense, and that such testimony would also be favorable to Shuford. He learned, however, from Jordan's attorneys that Jordan might not testify for fear that the Government would use a prior conviction to impeach him as a witness. At that time he represented that Jordan would be willing to testify as a witness for Shuford if Jordan was not then on trial, but he anticipated some problem if the trial proceeded without a severance.

The motion was denied at that time with leave to renew it later. It was renewed later, after the close of the Government's case, at which time Shuford's attorneys had been informed that the decision had been made to withhold Jordan from the witness stand. Shuford's lawyer then represented to the court that if Jordan were severed from the trial, a mistrial being declared as to him, so that Shuford could call him as a witness in the continuation of the trial as to Shuford, Jordan would testify that he knew of no instructions to Long to falsify reports, that Jordan knew of no error or falsity in the Wheat bill until he learned of it as a result of the F.B.I.'s investigation, that he had conspired with no one to falsify reports or claims, and that when he learned that discrepancies existed he had told Mr. Long to correct them all.

There was no representation that Jordan could testify to anything providing direct corroboration for Shuford's testimony about his conversations with Long. The only representation was that Jordan would offer testimonial exculpation of himself. Such testimony from Jordan might well have provided tangential support for Shuford, but the

proffer does not suggest the direct and immediate relevance indicated by the majority opinion.

Jordan and his attorneys participated in this discussion only to the extent of a statement that it was not then anticipated that Jordan would testify for the reasons previously suggested by Shuford's attorney, fear that the Government would use the earlier conviction to impeach him and fear that his appearance as a witness might somehow bolster the Government's case against Jordan.

The District Court thereupon denied Shuford's motion, but it did so with an extension of substantial protection to Jordan should he decide to testify. The Court stated that if Jordan should testify in the joint trial it would not permit the Government to use his prior conviction as a basis for impeachment of him as a witness.

Thereafter, Jordan made a motion for a directed verdict which was denied. He then moved for a severance on the ground that a joint trial with Shuford was unfair to Jordan. He had not joined in Shuford's earlier motion to sever, however, and at no time did he indicate a willingness to have a mistrial declared as to him and to testify, without a claim of his Fifth Amendment privilege, as a witness for Shuford in a continuation of the trial as to Shuford. The record contains no disclaimer by Jordan of Shuford's lawyer's pretrial representation that Jordan would be willing to testify as a witness for Shuford if Jordan were not then on trial, but there is no affirmative representation by Jordan, or his lawyer, with respect to any phase of the matter, and, with respect to him, the situation had materially changed after the joint trial had proceeded to the close of the Government's case.

The majority has noted that Jordan could not be tried in a separate trial as an aider and abettor until Shuford's guilt had been established. At the close of the Government's case, the only practical course open to the Court, if a severance was to be granted, was the one suggested by Shuford's counsel—that a mistrial be declared as to Jordan and the trial proceed as to Shuford.[1]

If Jordan had then been eliminated from the case on Shuford's motion under circumstances which would permit his subsequent separate trial, it seems to me highly speculative that Jordan would have been available as a witness in Shuford's defense in any meaningful sense. No longer on trial himself, Jordan would then have been without the protection of the Court's order preventing the Government's impeachment use of his prior criminal record. At that time his counsel would have been compelled to advise him that whatever he said as a witness in Shuford's defense might be used in whole or in part in his subsequent trial. If he had any concern that his testimony as a witness might bolster the Government's case against him, as was represented in Shuford's second motion for a severance, the inhibiting weight of that concern would be as heavy upon Jordan whether or not he remained jointly on trial with Shuford.

Under all these circumstances, therefore, it seems to me that the District Judge's assurance that Jordan would not be subject to impeachment by the Government on the basis

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[1] It is possible that Jordan and his lawyer would have consented to this since he later sought a severance as to himself, but the record contains no affirmative evidence of it. He might well have withheld his consent in the hope of erecting a bar against his subsequent retrial.

of his prior record if he testified at the joint trial was the fairest and most practical protection available, and it was equally so in the interest of both Shuford and Jordan. A severance would have given neither one more protection on that score and would not tend to alleviate in any way Jordan's concern about filling in some gap in the Government's case against him.

Far from abusing his discretion, therefore, it seems to me the District Judge offered a reasonable solution to the dilemma of the defendants. Rather than depriving the trial of essential fairness, it seems markedly fair. Now we give assurance that Jordan will testify in Shuford's defense since we leave standing his conviction as an aider and abettor, conditioned upon Shuford's subsequent conviction, but neither Shuford nor Jordan had any rightful claim to that kind of advantage.[2] The District Court's very practical resolution of the matter was more in the interest of justice and without the taint of basic unfairness which, alone, would warrant our awarding a new trial because of a denial of a motion for severance.

The situation in *Echeles*[3] was far different from the one which confronted the District Judge here. Echeles had represented Arrington, a defendant in a narcotics case who claimed an alibi. Arrington procured the falsification of a motel registration card and supporting testimony of the motel operator and clerk in aid of the alibi defense.

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[2] Since the developments have left Jordan with no hope of avoidance of his conviction except by Shuford's acquittal, he has every incentive for active cooperation to procure that acquittal, even to the point of grave incrimination of himself in the process.

[3] United States v. Echeles, 7 Cir., 352 F. 2d 892.

The falsity of this evidence was discovered before the conclusion of the narcotics case. Thereupon, Arrington admitted his participation in the perjury, but twice in open court informed the judge that Echeles, his lawyer, had had nothing to do with it.

When Echeles, Arrington and others, were being tried on the perjury charges, Arrington's admissions of perjury, made in the narcotics trial, were received in evidence, but his statements exonerating Echeles were excluded. Unlike this case, Arrington was the principal who had full knowledge of the extent, if any, to which Echeles had participated in the perjurious scheme. Twice in the narcotics case, while confessing his own participation, he had stated that Echeles had nothing to do with it, and there was no reason to suppose he would not repeat such statements if, in a severed trial, Echeles did call him as a witness in his defense. Moreover, the introduction of Arrington's admissions and the exclusion of his accompanying exoneration of Echeles inevitably had a prejudicial effect on Echeles, the lawyer representing Arrington when the perjured testimony and false registration card were introduced.

Here the situation was quite different. Shuford stood in no comparable need of Jordan's testimony, for Jordan could offer no direct contradiction of Long's testimony about the instructions he had received from Shuford. Nor did any extrajudicial admissions of Jordan come into the case which adversely affected Shuford's interest.

And, finally, the Court here, by denying the Government the right to use Jordan's prior criminal record in his cross examination, freed Jordan from all substantial reason for not taking the witness-stand in the joint trial which would

not be present in an equal way had Shuford's severance motion been granted. In *Echeles*, nothing was done to relieve Arrington's very understandable disinclination to testify in a joint trial; probably nothing of that sort could have been done.

This case simply cannot be blown up into the extraordinary kind of situation presented in *Echeles*. It is a frequently encountered situation routinely left to the discretion of the trial judge. The manner in which the trial judge exercised his discretion here deserves our commendation rather than our criticism.

I would affirm the convictions.